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BY
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THE INDIAN LAW REPORTS, BOMBAY SERIES,
CONTAINING CASES DETERMINED BY THE HIGH
COURT AT BOMBAY AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL
FROM THAT COURT.

BOMBAY—Vol. XVII-1893.

PRIVY COUNCIL.

The 31st May and 2nd July, 1892.

PRESENT:

LORDS WATSON AND MORRIS, SIR R. COUCH, AND LORD SHAND.

Abdul Gafur and others.....Plaintiffs

versus

Nizamudin and others.... Defendants.

[On appeal from the High Court at Bombay.]

Mahomedan law—Wakf—Settlement—Will—Invalidity of attempted settlement purporting to constitute a wakf—Document not establishing a trust for a religious or charitable purpose, at some time, invalid as a wakfnama.

A *wakfnama* to be valid must be a substantial dedication of property to a religious or charitable purpose at some time or other.

Mahomed Ahsanulla Chowdhury v. Amarchand Kundu, L. R., 17 I. A., 28; 1. L. R., 17 Cal., 498, referred to and followed.

Where a *wakfnama* purported to make a settlement on heirs, the settlor's intention having been to make the whole estate devolve from one generation to another, without being alienable by them, and without being liable in execution against them,

Held, that the instrument could neither be maintained as establishing a *wakf*, nor as a settlement: also, that it could not be supported as a will, not having been validated by consent of heirs, as to two-thirds of the succession; and that, even if it could have been dealt with as a will, the above provision would have been void.

APPEAL from a decree, *Nizamudin v. Abdul Gafur*, 1. L. R., 13 Bom., 264, (11th June 1888) of the High Court reversing a decree (17th February 1887) of the Assistant Judge of the Thana District, which affirmed a decree (27th March 1886) of the Second Class Subordinate Judge of Panvel.

The *wakfnama*, to which the appeal related, was executed on the 16th January 1838, by Karimuddin, a Shafi, who died in 1840. Two of the five plaintiffs, now appellants, were *mutawallis* appointed by the District Court in

1884, and all were kinsmen [2] of Karimuddin. The property was a tract of salt works, with buildings, in taluka Panvel in the Kolaba District. On the 22nd June 1866, under a decree against Karimuddin's daughter, Tahira, her right, title and interest (Civil Procedure Code Act VIII of 1859, section 249) were sold at a Court sale. The defendants, (now respondents), made title through the purchasers.

The question, what right of Tahira was sold in 1866, depended on the validity and effect of a disposition, made in the *wakfnama* of 1838, for the benefit of the family and heirs of Karimuddin.

In another case, *Phat Saheb Bibi v. Damodar Premji*, I. L. R., 3 Bom., 84, this document was before the Court on another point. It purported to settle, with certain exceptions, moieties of Karimuddin's estate on his two wives, and on their respective daughters, and their descendants, so long as each line should subsist, with cross-remainders, on the extinction of either line, to those who might represent the other, with a final remainder to the right heirs. Part of the estate was expressly devoted to specific religious purposes; but there was no dispute as to that; and this suit was confined to a share as to which no trust for any religious, or charitable, purpose was declared. One of the important clauses was the following:—"Neither of the said two wives, nor any one of the *aulad* of the said two wives, shall alienate by sale, gift, or mortgage, either of their shares of the above property."

The *wakfnama* is set forth in the report of the appeal in the High Court, I. L. R., 13 Bom., 264.

The decisions of the Courts below, with the proceedings before this appeal, appear in their Lordships' judgment. On a second appeal, the Judges (BIRDWOOD and PARSONS, JJ.) were of opinion that the document of 1838 could not be supported as creating a *wakf*, as it contained no ultimate dedication of the property to a religious, or charitable, purpose. As a mere deed of settlement it could not receive effect, as Karimuddin had not, by law, power to make a series of life-estates with remainder to his heirs. The judgment is given at length in I. L. R., 13 Bom., at p. 270.

On this appeal,

Mr. J. D. Mayne for the Appellants:—The disposition for secular [3] purposes in the *wakfnama* can hardly be supported as constituting a *wakf*. Recent decisions are to the contrary of giving such an effect to a *wakfnama* where there is no gift to operate at any time for a religious, or charitable, use. See *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu*, L. R., 17 I. A., 28; I. L. R., 17 Cal., 498. But, if there was a consent on the part of the heirs, who are benefited, the instrument is maintainable as a will. There are difficulties in the way of treating it as a settlement. There was, however, the case of a grant for life in *Umes Chunder Sircar v. Zahur Fatima*, L. R., 17 I. A., 201; I. L. R., 18 Cal., 164. As a will, it might be that the document could receive effect, if assented to.

Reference was made to *Khajooronissa v. Rowshan Jehan*, I. R., 3 I. A., 291; I. L. R., 2 Cal., 184.

The respondents did not appear. Their Lordships' judgment was delivered on a subsequent date (July 2nd) by

Lord Watson:—The appellants are plaintiffs in this suit, which was brought in 1884 for possession of lands which had been taken in execution and judicially sold in the year 1866, and were thereafter purchased by the father of the defendants. The cause of action disclosed in the plaint was this—that Tahirabibi, the judgment-debtor, held the lands under a *wakfnama* executed in January 1838, by her father Karimuddin, which limited her interest to a bare life rent; that the decree of sale only carried the life estate of Tahirabibi who died in November 1873; that the defendants' title to possess came to an end

upon her death, and the lands reverted, in the first place, to her sister Fatehsahebbibi in life-rent and on her decease to the appellants as heirs of Karimuddin and his daughter Fatehsahebbibi. The issue adjudge to try the only matter affecting the merits of the case, namely, the nature of the interest which the judgment-debtor had in the lands sold for her debt, was thus expressed,—“Is the *wakfnama* of 1838 valid according to the Mahomedan law?”

The Second Class Subordinate Judge of Panvel found for the appellants, being of opinion that Karimuddin's deed of 1838, although ineffectual to constitute a proper *wakf*, was nevertheless [4] valid as a settlement, and also that Tahirabibi had a mere life-estate. The Assistant Judge of Thana affirmed his decree for reasons substantially the same, recognizing the efficacy of the deed as a settlement; but, on second appeal to the High Court of Bombay, both judgments were reversed and the appellant's claim rejected with costs. The learned Judges agreed with both Courts below that the deed was invalid as a *wakfnama*; but they held that it was also inoperative as a settlement, in respect that no possession had followed upon the lifetime of Karimuddin.

The learned counsel who appeared for the appellants, with great candour and propriety, admitted that after the recent decision of this Board in the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu*, L. R., 17 I. A., 28, he could not successfully maintain the document of 1838 to be valid as a *wakfnama*. In that case Lord HOBHOUSE said that their Lordships “have not been referred to, nor can they find any authority showing that, according to Mahomedan law, a gift is good as a *wakfnama*, unless there is a substantial dedication of the property to charitable uses at some period of time or other.” In this case the so-called *wakfnama* makes no gift of the lands in question, either immediate or ultimate, for religious or charitable purposes. The document professes to create a *wakf*, but, in reality, the legal heirs of Karimuddin are the only objects of his bounty. The lands are destined to his wives and children, and to the descendants of the latter in perpetuity, in the order and according to the shares prescribed by the Mahomedan law of succession, but subject to the limitation that none of them shall have the power of alienation by sale, gift, or mortgage.

Counsel also admitted that he could not successfully maintain that the document was a settlement, but he endeavoured to support the appeal on the ground that the deed, styled a *wakfnama*, ought to be treated as the will of Karimuddin. He did not dispute that a Mahomedan cannot of himself, by a testamentary writing, either curtail or defeat the legal interests of his heirs; and that a Mahomedan will is, therefore, inoperative with regard to two-thirds of the testator's succession, unless it is validated [5] by the consent of the heirs having interest. Their Lordships do not think the appellants would take any benefit from the document of 1838 if it were construed as the will of Karimuddin. It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see *Humeeda and others v. Budhan and the Government*, 17 W. R., 525, Civ. R.), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life-estate, but a full owner, with prohibition against alienation, which, being void in law, could not affect either herself or her creditors. Although this point was taken in the High Court, the appellants were not in a position to press it. They have not averred in their pleadings that Tahirabibi gave such consent, and there is no evidence to show that she did. Besides, there was no issue taken upon the point, and, therefore, no finding in fact upon which the High Court could proceed in a second appeal.

The judgment of the High Court appears to their Lordships to dispose, in a satisfactory manner, of all the arguments which have been addressed to them in the *ex parte* argument upon this appeal. They will humbly advise Her Majesty to affirm the judgment complained of, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the Appellants :—Messrs. *Narrow and Rogers.*

NOTES.

[The Mussulman Wakf Validation Act 1913 has validated substantial gifts to wakf notwithstanding intermediate family settlements; doing away with the authority of several Privy Council decisions to the contrary—like (1894) 22 Cal., 619; also see (1903) 5 Bom. L. R. 624; (1903) 30 Cal., 666.

As regards the validity of life-estates, see also (1897) 11 C.P.L.R., 150; (1902) 4 C.L.J. 442; (1903) 27 Bom. 500; (1905) 7 Bom. L.R., 306; (1907) 9 Bom. L. R., 295; (1907) 9 Bom. L.R., 1837; (1912) 18 I. C., 185; 24 M.L.J., 258; (1913) 23 I. C., 903 (Burma).]

[6] ORIGINAL CIVIL.

The 29th July and September, 1892.

PRESENT :

MR. JUSTICE BAYLEY (ACTING CHIEF JUSTICE) AND
MR. JUSTICE FARBAN.

Motilal Bechardass and others.....Plaintiffs

versus

Ghellabhai Hariram and others.....Defendants*

and

Bhana Lulla and others.....Plaintiffs

versus

Danabhoj Sagunbaksh and others.....Defendants.†

Partnership—Death of partner—Sue by firm for a debt accrued due during his life—His representatives need not be parties—Practice—

Parties— Indian Contract Act, IX of 1872, Sec. 45.

The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the lifetime of the deceased partner.

CASE stated for the opinion of the High Court by C. W. Chitty, Chief Judge of the Bombay Court of Small Causes, under section 69 of the Presidency Small Cause Courts' Act (XV of 1882).—

"1. In this case the plaintiffs, sons of Bechar Nagar, deceased, sue to recover a sum of Rs. 545-7-0 as the balance of an agency account for goods purchased and moneys paid by the plaintiffs, on account of goods in Bombay, from *Magha Vad 3rd* to *Jesh Sud 5th, 1945*, (18th February to 3rd June 1889).

"2. The defendants took the preliminary objection that Bechar Nagar was a member of the firm when the debt accrued due, that he died about a year ago; that his representatives were not joined, and that no probate or letters of administration or certificate to his estate had been taken out.

"3. It was proved that the plaintiffs, five brothers and their father carried on a joint business in the name of Bechar Nagar at Surat. They were

* Small Cause Court Suit, No. 15099 of 1891. † Small Cause Court Suit, No. 1682 of 1892.

members of a joint and undivided Hindu family, but the said Bechar Nager had no brothers or nephews. The said Bechar Nager died a year ago, after the accrual of the debt in question.

"4. The question for decision in this case is the same as that in Suit No. 1682 of 1892, which is sent with this, namely, whether under section 45 * of the Contract Act the representatives of a deceased partner are necessary parties to a suit for the recovery [7] of a debt which accrued due to the partnership in the lifetime of the deceased partner.

"5. If the above question be decided in the affirmative, the further question also arises in this case, whether such a rule would apply in the case of a joint and undivided Hindu family carrying on a business in partnership.

"6. This case is stated on the application of the defendants and I have postponed the hearing of the suit pending the decision of their Lordships on the above points."

Russell for the Plaintiffs in Suit No. 15099 of 1891.

Anderson at the request of the Court appeared for the Defendants.

The parties in the second suit (No. 1682 of 1892), were not represented by counsel.

The arguments of counsel and the authorities cited fully appear from the judgment, which was delivered by

Farran, J. :—Upon the first question referred for our opinion in this case there is a conflict of decision between the High Court of Calcutta and the High Court of Allahabad. The latter Court has held that the surviving partners in a firm can sue for a debt due to the partnership without joining the representatives of a deceased partner as plaintiffs—*Gobind Prasad v. Chandar Sekhar*, I. L. R., 9 All., 486. "The Calcutta High Court has ruled that the representatives of a deceased partner are, in such a case, necessary parties to the suit—*Ram Narain v. Ram Chunder*, I. L. R., 18 Cal., 86.

The question as to what plaintiffs should join in suing to enforce a joint right, is not determined by Statute law in India. The rules by which that question must be solved are rules adopted by the Judges in India from the rules of English law and equity, modified on account of the different procedure which prevails here and in part altered by legislation. In the Common Law Courts in England, before the Judicature Acts, it was necessary for all persons, jointly interested at law, to join in suing as plaintiffs. The same rule prevails generally in equity; but, when there was a substantial ground for not making some of such persons plaintiffs, it has been held sufficient if they were made defendants—*Daniell's Chancery Practice* (6th Ed.), Vol. 1, [8] p. 216; *Luke v. South Kensington Hotel Company*, 11 Ch D, 121. These rules, though not of statutory obligation, were deemed essential to the due administration of justice, in order that the same defendant might not be more than once molested in respect of the same cause of action, to give the debtors a valid discharge, and to prevent multiplicity of suits. According to the old English practice, however, not only was it requisite to make all proper persons plaintiffs, but at law the misjoinder of plaintiffs was fatal to the action; and the rules as to who could join in suing were strict and narrow. It was often difficult to select the proper plaintiffs, and mistakes frequently occurred on account of the stringency of the law. To remedy this inconvenience, and to give a latitude, which was

[Sec. 45 :—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.]

considered advisable in this branch of the law of procedure, the rules framed under the Judicature Acts provided that all persons might be joined as plaintiffs in whom the right to any relief claimed was alleged to exist, whether jointly, severally, or in the alternative (Order XVI, R. 11). After the passing of this rule, a misjoinder of plaintiffs, except in the matter of costs, became an immaterial error. The rules and practice, as to the necessity of joining, as parties to the suit, all persons jointly interested in the cause of action, have been adopted by all the Indian High Courts—*Kalidas Kevaldas v. Nathu Bhagvan*, I. L. R., 7 Bom., 217; *Dular Chand v. Balram Das*, I. L. R., 1 All., 453; *Ramsebuk v. Ramlail Koondoo*, I. L. R., 6 Cal., 815; *Arunachala v. Vythilinga*, I. L. R., 6 Mad., 27. The case last cited is an authority for saying that the rule adopted in the Court of Chancery, rather than that followed by the Courts of Common Law, is the one followed in India.

The Indian Legislature has introduced the provision as to the persons who can sue as plaintiffs in a joint and in a common cause of action from the rules framed under the Judicature Act which we have adverted to. It is now enacted as section 26 of the Civil Procedure Code. This is a permissive section enacted for the reason and with the object already referred to. The general law, as to the necessity of joining as parties to the suit all persons who have a joint or common interest in the cause [9] of action, and as to the consequences of a misjoinder of plaintiffs, may be said to be now practically identical under English law and under the practice of the Indian Courts.

Turning to the more particular question with which we have to deal in this reference—the law applicable to joint contractors—we find that, at common law, on the death of one of them the benefit of the joint contract devolved upon the survivors. "In the same manner it is of debts and duties, &c., for if in obligation be made to many for one debt, he, which surviveth, shall have the whole debt or duties, and so it is of other covenants, contracts, &c.", Coke upon Littleton (Ed. 1832), Vol. II, Sec. 282, p. 182a. An exception was made in the case of partners in trade. The comment of Lord COKE upon the above passage from Littleton is this: "Here by force of the Act an exception is to be made of two joint merchants for the wares, merchandize, debts or duties that they have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth, and this is *per legem mercatoriam*, which (as hath been said) is part of the laws of this realm for the advancement and continuance of commerce and trade which is *pro bono publico* for the rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. And to the latter, &c., in this section the like exceptions must be made." Mr. Justice WILLIAMS says: "The general rule is that the interest which the testator had in a chose in action jointly with another shall not pass to his executor, yet *per legem mercatoriam* as formerly mentioned an exception was established in favour of merchants which has been extended to all traders and persons engaged in joint undertakings in the nature of trade" —Williams on Executors (8th Ed.), at p. 850. This is relied upon as a true exposition of the law by MELLISH, L. J., in *McGlean v. Kennard*, L. R., 9 Ch., 336, at p. 346. The whole subject is elaborately considered in *Buckley v. Barber*. It is clear upon these authorities that in the case of trading partnerships the benefit of a deceased [10] partner in a joint contract survived to his executors, both at law and in equity, under the English system. That portion of the English law was incorporated into the law administered in India long before the Indian Contract Act.

* 6 Ex., 178. The distinctions drawn in this case are difficult to follow. Lord Justice LINDLEY speaks of it as a "perplexing case." Lindley on Partnership (5th Ed.), p. 342 (in notes).

The obligations of joint debtors under a joint contract were governed by similar principles. All, if living, were liable to the creditor for the due performance of the contract, but this liability did not devolve, either at law or in equity, upon the representatives of one of them dying in the lifetime of the others—*Richardson v. Horton*, 6 Beav. 185; *Other v. Iveson*, 3 Drew., 177. Partners stood upon a different footing. The estate of a deceased partner was liable, in equity, in respect of a joint contract of the firm. As to how that equity arose, see the judgment of CAIRNS, L. C., in *Kendal v. Hamilton*, 4 Ap. Ca., 504, at p. 516. This equity was also given effect to in Courts in India before the Contract Act. In this High Court it was the common practice to sue the surviving partners and the representatives of a deceased partner for debts due by the firm.

The Indian Contract Act was avowedly based upon the English law. In the case of joint contracts it made a radical change. Section 45, dealing with the right under a joint contract, provides that (unless a contrary intention appears from the contract) "when a person has made a joint contract with two or more persons jointly the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors." This enactment places all joint contractors, where a contrary intention is not expressed, upon the same footing as partners jointly contracting (as we have shown) formerly stood. The maxim in India now should be *jus accrescendi inter contractores locum non habet nisi aliter in contractu expressum*.

A somewhat analogous change was made by section 42 in the obligation which joint contractors lay under to fulfil a joint contract. The obligation is extended to the representatives of [11] a deceased contractor, thus again assimilating the law to that which prevailed in the case of partners jointly contracting. The provision of section 43, which gives the right to the creditor to compel any one of the joint contractors, or the representatives of a deceased contractor, to perform the contract, seems now both in the case of ordinary joint contractors and in that of partners jointly contracting; as far as the liability under a contract is concerned, it appears to make all joint contracts joint and several.

We cannot doubt but that these sections, which we have referred to, relate to partners as well as to other co-contractors. It has been so decided in *Lukmidas Khimji v. Purshotam Haridas*, I. L. R., 6 Bom., 700, and, we think, rightly. If the Legislature had intended to except partners from the provisions of these sections, it would have done so in express words. There is no reason for thinking that the general rules laid down in Chapter IV of the Contract Act are not applicable to partners as well as to other contracting parties. The sections under consideration seem, on the contrary, to be intended to assimilate the law relating to joint contracts generally to that which has always been applied to partners contracting jointly.

The Contract Act is not, however, an Act of Procedure. It defines and declares rights and obligations arising out of contracts and obligations *quasi ex contractu*. The rules as to the procedure for enforcing these rights—the remedy in cases of breach of them—must be sought elsewhere.

In the case of contracts, as in other divisions of the law relating to actions, the parties to sue and to be sued were by English law usually those in whom the right to enforce and the liability under a contract "rested," to use an expression borrowed from the Contract Act. These rules governing the proper choice of plaintiffs and defendants in the case of joint contracts will be found concisely

stated by Mr. Dicey in his work on Parties to Actions (R. 16, 48; 52, 55 and 58). Speaking broadly, the representatives of deceased joint contractors were not proper parties, either as plaintiffs or defendants, in an action [12] upon a joint contract, but all living parties to the contract were necessary parties. The reason of these rules founded on substantive law relating to joint contracts excluding the representatives of deceased contractors from the benefit and burden of joint contracts has ceased to exist in India since the Contract Act was passed. Logically; the rules should also cease to be operative *ratione cessante lex ipsa cessat*.

The practice relating to the remedy in favour of and against partners was, in English law, anomalous. Although amongst them there was no *jus accrescendi*, and the interest of a deceased partner in the joint property, including the contracts of the firm devolved upon his executors, the latter could not join the surviving partners in an action upon joint partnership contract—Dicey, R. 21 and 24; Lindley on Partnership (5th Ed.), p. 284. This is stated by Mr. Justice WILLIAMS in the passage I have quoted above. It continues thus: "But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable on recovery to account to the executors or administrators for the share of the deceased"—Williams on Executors (8th Ed.), p. 850.

A more logical view was taken in one old case. A surviving partner sued for a debt due to the partnership. The defendant demurred on the ground that the executor of the deceased partner was a necessary co-plaintiff. The demurrer was allowed—*Hall v. Huffam*, 2 Lev., pp. 188 and 228. That case was, however, overruled, and the law before the Judicature Acts was well established, that the right to sue for a debt owing to the firm devolved, in the event of the death of one partner, upon the surviving partners exclusively—Lindley on Partnership (5th Ed.), p. 341.

The same anomalous practice prevailed in Courts of Equity. When the surviving partner in a firm sued for an account, or other legal claims, it was not, except under special circumstances necessary to make the personal representatives of a deceased partner parties to the suit—*Haig v. Gray*, 3 DeG. & Sm., 744; Daniell's Chancery Practice, [13] p. 219, (6th Ed.), Vol. I. The Judicature Acts and Rules have made no changes in procedure when a surviving partner sues—Bullen and Leake's Pleadings (4th Ed.), Vol. I, p. 294. The same practice prevailed in Indian Courts in the Bombay High Court and in the late Supreme Court at Bombay, at all events before the Indian Contract Act.

Since the passing of that Act the practice in the High Court of Calcutta has been changed—*Ram Narain v. Ram Chunder*, I. L. R., 18 Cal., 86; but not in the Allahabad High Court—*Gobind Prasad v. Chandar Sekhar*, I. L. R., 9 All., 486. Logical consistency has there yielded to long-established practice based upon considerations of practical convenience. The inconvenience, often resulting in a denial of justice, of altering the procedure is pointed out by EDGE, C. J., in his judgment in the above cited case of *Gobind Prasad v. Chandar Sekhar*, I. L. R., 9 All., 486.

In the judgment of the third Judge of the Small Cause Court, in a case sent up with this reference, it is stated that the practice of the Small Cause Court in Bombay has, hitherto, been not to join the heirs of a deceased co-partner with the surviving partners when suing for a partnership debt. The question has not been, so far as we know, the subject of judicial decision in this High Court, though we believe that since the dictum of the Court in *Lukmidas Khamji v. Purshotam Haridas*, I. L. R., 6 Bom., 700, it has been

more usual to add the heirs of a deceased partner as parties plaintiffs *ex majore cautela*. This was a mere form until the passing of the recent Act making it necessary for such heirs to obtain probate or letters of administration before a judgment can be passed in their favour. It has now become a matter of vital importance.

To the observations of EDGE, C. J., may be added the remark that frequently the representative of a deceased partner has no interest whatever in the property of the firm, such interest being often represented by a *minus* quantity. Section 263* of the Contract Act IX of 1872 preserves to surviving partners the right of giving valid discharges to debtors of the firm which they possessed under [14] English law—*Butchart v. Dresser*, 4 DeG. M. & G., 542, *Brasier v. Hudson*, 9 Sim., 1; *Lindley on Partnership* (5th Ed.), p. 312. There is no reason on that ground for holding that the surviving partners are not competent to sue.

The introduction, into section 45, of the words "as between him and them" occasions, no doubt, a serious difficulty in adopting the ruling of the High Court of Allahabad. It is difficult to give these words their full effect if the surviving contractors in the case of partners are allowed to sue alone. The right to performance of the contract, as far as the other contracting party is concerned, rests just as much with the representative of the deceased partner as with the surviving partner. Can the latter, then, sue without joining the former as a party to the suit? Logical consistency points to an answer in the negative. The case of partners is, however, as we have shown, anomalous, and we think that as the Legislature has not enacted that the representatives of a deceased partner must join in suing in a partnership contract jointly with the surviving partners, we are not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Cause Court need not be changed.

The decision of this Court in *Raghavendra Madhav v. Bhima*, I. L. R., 16 Bom., p. 349, involves an answer in the affirmative to the second question.

Attorney for the Plaintiffs : Mr. T. A. Bland.

NOTES.

[1. This was followed and approved in (1910) 32 All., 638; (1898) 20 All., 965; (1893) 17 Mad., 108; (1897) 21 Bom., 412; (1906) P. R., 10; (1907) 1 S.L.R., 191; (1909) 13 C.W. N., 509; (1908) 10 Bom. L. R., 306; (1914) 21 I. C., 268 (Burma).

2. As regards the effect of the Indian Contract Act in the applicability of *King v. Hoare*, see also (1900) 22 All., 307; (1912) 16 I. C., 852; 17 C.L.J., 201.]

Continuance of partners' rights and obligations after dissolution.

*[Sec. 263 :—After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding-up the business of the partnership.]

[17 Bom. 15]

ORIGINAL CIVIL.

The 2nd September, 1892.

PRESENT:

MR. JUSTICE BAYLEY, ACTING CHIEF JUSTICE, AND MR. JUSTICE FARRAN.

Vassonji Tricumji and Co.....Plaintiffs (Petitioners)

versus

The Southern Maratha Railway Company.....Defendants (Opponents).*

*Presidency Small Cause Courts Act (XV of 1882), Secs. 38 and 69—Rehearing—
Miscarriage or failure of justice—Case stated for the opinion of the High Court.*

In a suit in the Court of Small Causes, in which questions of law and fact were raised, the plaintiffs at first asked the Judge to state a case for the opinion of the High Court under section 69 of Act XV of 1882. The Judge was willing to do [15] so, but the plaintiffs withdrew their request. The Judge thereupon delivered his judgment and dismissed the suit. The plaintiffs then applied to the High Court for a rehearing under section 38 of Act XV of 1882. It was contended that the Judge was wrong in his view of the law as applicable to the facts.

Held that, even if that were the case, there was no "miscarriage or failure of justice" within the meaning of section 38, and that the plaintiffs were not entitled to a rehearing.

APPLICATION for a rehearing under section 38 of the Presidency Small Cause Courts Act (XV of 1882).

The plaintiffs petitioned for a rehearing of this suit, which had been dismissed with costs by C. W. Chitty, the Chief Judge of the Small Cause Court, on the 10th August 1892.

The plaintiffs had at first asked the Chief Judge to state a case for the opinion of the High Court, under section 69 of the Small Cause Courts Act, but subsequently withdrew such request on the ground that they were advised to apply for a rehearing under section 38 of the Act.

The petition stated as follows—

1. That your petitioners brought a suit (No. 12790 of 1892) in the Bombay Court of Small Causes against the defendants, the Southern Maratha Railway Company, for the recovery from them of the sum of Rs. 1,481-15, being the amount levied by the defendant Company, or their agents, the Bomony Steam Navigation Company, at Bombay in respect of Port Trust charges and in excess of the freights for which the defendant Company had agreed to carry from stations on the line of their railway to Bombay, *via* Marmagão, several consignments of cotton belonging to the petitioners, and which amount the petitioners were forced to pay and did pay under protest for obtaining delivery of their said consignments.

2. That the defendant Company without filing any written statement of their defence proceeded to a trial of this suit, which took place before His Honour the First Judge of the Bombay Court of Small Causes.

3. That the hearing of this suit took place on Wednesday the 3rd and Friday the 5th August instant, on which last-mentioned day the judgment was reserved; and on Wednesday the 10th [16] August His Honour gave judgment dismissing the said suit with costs, and certifying the defendant Company's professional costs Rs. 90.

* Small Cause Court Suit, No. 200/12790 of 1892.

4. That the receipts of the defendant Company, put in for the plaintiffs in the said suit, which formed their contracts for carriage of the plaintiffs' goods, purport to be dated at the booking stations, and to acknowledge the receipt of such goods for conveyance "to Bombay station by goods train," or "to Bombay station by rail and sea," with different rates of freight inserted in a column therein, in that behalf for the defendant Company, the West of India Portuguese Railway and the Bombay Steam Navigation Company respectively, and among the conditions of contract endorsed upon such receipts the following are set forth, namely:—

(i) "The Southern Maratha Railway Company's responsibility for all goods will be considered to have terminated when forty-eight hours have expired after arrival at the station to which they are consigned."

(ii) "Goods booked to Bombay or elsewhere by sea, *via* Marmagao, are subject to rules and regulations, conditions of carriage, wharfage and other charges in force on the railways and the shipping lines over and by which they are conveyed."

(iii) "Delivery orders for goods booked to Bombay, *via* Marmagao, will be granted at the Bombay Steam Navigation Company's offices at Bombay on production of this receipt note."

5. That the agreement in writing, dated the 7th November 1890, and made between the said West of India Portuguese Railway Company of the one part and the said Bombay Steam Navigation Company of the other part, in respect of the carriage of goods by the steamers of the latter Company from Marmagao to Bombay, put in for the plaintiffs, contains, in the 14th clause thereof, a provision to the effect that the said Bombay Steam Navigation Company shall land and deliver the goods to the consignees from their godowns in Bombay.

6. That, in the absence of any special agreement to the contrary, all terminal services, such as those for which the Port [17] Trust charges in question are made, are always regarded as included in the railway freights and performed by the railway free of any additional charge.

7. That the British India Steam Navigation Company, by whose steamers the goods arriving by the railways were brought down from Marmagao to Bombay prior to the month of November 1890, made no charge whatever against the goods, in the nature of the Port Trust charges now made by the Bombay Steam Navigation Company, and the plaintiffs have never had any notice whatever, either from the defendant Company or the Bombay Steam Navigation Company, that the payment of such charges would, at any time, be insisted upon.

8. The plaintiffs respectfully submit to this Honourable Court—

(a) that the said learned Judge ought to have held the contracts of the defendant Company in question in the said suit to be for conveyance of the plaintiffs' goods to, and delivery of the same at Bombay station for the freights therein specified and free of any further charge;

(b) that the said learned Judge ought to have held that the words "to Bombay station," in the railway receipts forming such contracts, were not so important as he supposed, but on the contrary the same were of the gravest moment in the case, and clearly signified the liability of the defendant Company to convey, land and deliver the goods to the plaintiffs at Bombay for the freights therein specified, and without making any additional charge;

(c) that the said learned Judge ought to have held that the defendant Company, having by their written contracts, agreed for the freights therein specified to convey, land and deliver, the plaintiffs' goods to and at Bombay

station, ought to have themselves performed the services of removing, sorting, storing and delivering such goods to the plaintiffs, for which the Port Trust charges in question are made, and which services were included in such freights; and that since the defendant Company did not perform such services; they were bound to pay the said Port Trust charges themselves;

[18] (d) that the said learned Judge ought to have held that the Bombay Steam Navigation Company, having under the fourteenth clause of the said agreement expressly agreed to give delivery of the goods to the consignees from their godowns at Bombay, were liable to perform the said services, or to pay the said Port Trust charges made for such services;

(e) that the said learned Judge was in error in holding, as he did, that the inclusion of wharfage in the proportion of freight due to the West of India Portuguese Railway Company, in the book of rates of the defendant Company, indicated, in the absence of any such inclusion in the proportion of freights due to the Bombay Steam Navigation Company, a liability on the part of the plaintiffs to pay the wharfage at Bombay;

(f) that the said learned Judge was in error in holding, as he did, that the clause commencing "goods booked to foreign stations," &c., clearly indicated that the further charges might have to be levied to which the consignees will be liable, inasmuch as the said clause, endorsed on the said receipts, by its latter part relating to goods booked to Bombay, or elsewhere, *vid Marmagao*, makes such goods subject to the rules and regulations, conditions of carriage, wharfage and other charges in force only "on the railways and shipping lines over and by which they are conveyed, and the Prince's Dock at Bombay, where the Port Trust charges in question are made, forms no part of the shipping line by which the plaintiffs' goods were conveyed;

(g) that the said learned Judge ought to have held that the "wharfage" so included in the proportion of freight due to the West of India Portuguese Railway Company and the "wharfage" mentioned in the said clause endorsed on the said receipts were neither of them, of the nature for which the said Port Trust charges are made at Bombay, but of the nature defined in clause thirty-six at page seven of the rate book of the defendant Company itself, namely:—
"All goods left on the railway premises more than forty-eight hours after midnight of the day on which they arrive, either for the convenience or by the desire or neglect of the consignor or consignee, will be subject to a wharfage charge of three pice per maund per twenty-four hours;"

[19] (h) that the said learned Judge ought to have held that, even in the absence of any special agreement either one way or the other, the defendant Company was bound to perform all terminal services of the nature for which the said Port Trust charges are made;

(i) that the said learned Judge was in error in holding, as he did, that the said Port Trust charges "are recoverable in all cases whether all or any of the said services are rendered or not," inasmuch as there is no evidence whatever in the case to warrant such assumption, and it is absolutely impossible for any consignee to take charge of his goods, unless the services, at least of sorting and delivering, have been previously rendered;

(j) that the said learned Judge was in error in drawing the distinction, he did, between Messrs. Shepherd and Company as agents for the defendant Company and Messrs. Shepherd and Company as agents for the Port Trustees, inasmuch as no such distinction actually existed, and Messrs. Shepherd and Company could not have been the agents of the Port Trustees if they had not been the agents of the defendant Company; nor could Messrs. Shepherd and

Company, as agents for the Port Trustees, make charges for the services which they, as agents of the defendant Company, were bound to render free of charges ;

(k) that the said learned Judge was in error in thinking, as he did, that the payment of the said Port Trust charges by the British India Steam Navigation Company, in their time, was "owing to the keen competition between the shipping lines at that time," and "in order to retain the contract themselves," inasmuch as there is no evidence whatever in the case to justify such supposition.

(l) that the said learned Judge was in error in holding, as he did, that neither the defendant Company, nor their agents the Bombay Steam Navigation Company, were bound to perform the said services for which the said Port Trust charges were made, inasmuch as such holding was against the evidence given in the case by the witness Gopal Bapuji, himself a clerk in the employment of the Bombay Steam Navigation Company, who stated : "The Bombay Steam Navigation Company is bound to [20] sort the goods when they arrive in Bombay; we pile them; we have our own staff for working; we ourselves deliver the goods; we charge nothing for that work; it is included in our two annas;" and also against the evidence given in the case by Mr. Moir himself, the manager of the Bombay Steam Navigation Company, and called on behalf of the defendant Company, who likewise stated : "I admit we are bound to give delivery from our godowns in Bombay; we have no godowns of our own in Bombay; we contemplated building godowns in Bombay, but when we found we could use Dock, we did so: we saved costs of building godowns."

(m) that the learned Judge was in error in holding, as he did, that the Port Trust charges were payable by the plaintiffs notwithstanding that it is in evidence (1) that Messrs. Shepherd and Company by the fourteenth clause of their said agreement with the West of India Portuguese Railway undertook to make delivery of the goods to the consignees from their godowns at Bombay; (2) that Messrs. Shepherd and Company did not, in breach of such agreement, build such godowns to save expense to themselves. and (3) that, if such godowns had been built and used, the said Port Trust charges could never have been levied in respect of the plaintiffs' goods;

(n) that the learned Judge was in error in applying, as he did, in this case the usages and customs relating to shipments covered by ordinary bills of lading, under which the consignees are bound to take delivery from the ship's tackles, and which are entirely different from the said receipts under which the defendant Company, or their agents at Bombay, were bound to convey, land and deliver the plaintiffs' goods at Bombay station;

(o) that the said judgment is against the weight of evidence in the case, and against law, equity and good conscience."

The petitioners prayed for an order under s. 38 of the Presidency Small Cause Courts Act, 1882, that the said suit might be re-heard in the High Court.

Inverarity for the Petitioners :—The learned Chief Judge has gone wrong in his law and appreciation of the facts, and has consequently come to a wrong decision. That amounts to a failure of justice, such as is contemplated by section 38 of the Small Cause Courts Act (XV of 1882). Counsel argued the various points of law set forth in the petition, citing several authorities.

(FAIRMAN, J. :—These are all nice points of law, and it may be desirable that the opinion of the High Court should be taken upon them. If so, why did you withdraw your request for a case to be stated? That would have been the right procedure; would it not?)

We are not bound to have a case stated. The Act gives this additional remedy in cases of importance over Rs. 1,000. This is the appropriate remedy

in such a case as the present. We are not satisfied with the learned Judge's findings on the facts; and, if we were to take a case, we should be bound by the facts as the Judge might state them.

Bayley, C.J. (ACTING):—The plaintiffs had a hearing of some length before the learned Chief Judge of the Small Cause Court, in which this case was admittedly gone into thoroughly and considered. The decision was given there, and with that decision they express themselves dissatisfied, and come to this Court for a rehearing under section 38 of the Small Causes Court Act. The learned Judge below was willing to state a case on the various points of law involved if the plaintiffs desired it, but thus the plaintiffs, by their pleader, expressly declined. Mr. Inverarity now contends that it was at the plaintiffs' option whether they should take a case under section 69 of the Act, or apply to this Court, as they have done, under section 38.

Now section 38 requires that the party asking for a rehearing must make out that there has been "a miscarriage of justice" or "other grounds for a rehearing." Mr. Inverarity's argument amounts to this, that the Judge was wrong in the view he took of the law as applicable to the facts of the case. It is possible that that might prove to be so if the case were thoroughly considered, but is that what section 38 means by "a miscarriage or failure of justice"? I do not think it is, and, therefore, in my opinion, this application should be refused.

[22] Farran, J.:—I concur. The argument of Mr. Inverarity, though pressed with much emphasis, has not caused me to be of opinion that there has been a miscarriage or failure of justice in this case, or even an error in law, nor do I see that there are other good grounds for a rehearing. Speaking for myself I am inclined to think that a rehearing should not be granted under this section when the parties have been contented to take the opinion of the Small Cause Court on nice points of law, or on delicate questions as to the proper inference to be drawn from written documents and undisputed facts, merely because the High Court may incline to entertain, on an *ex-parte* argument, a view different from that which the Judge of the Small Cause Court has arrived at. The Legislature has not given an appeal from the Small Cause Court to the High Court on questions of law, but has provided by section 69, for parties who prefer to have the opinion of the High Court rather than that of the Small Cause Court Judge, on such questions, the means of obtaining it. It is difficult to see how there can be said to be a "miscarriage or failure of justice," when a party, instead of taking the opinion of the High Court, as he has the means of doing, voluntarily elects to have the law applicable to this case decided by the Small Cause Court. A mistake in law and a miscarriage or failure of justice are not, in my opinion, convertible terms. It is not, however, necessary to decide in the present circumstance. I merely suggest this question, feeling how excessively inconvenient it is to have nice questions of law argued *ex parte* before us; and entertaining, as I do, a serious doubt whether the Legislature intended to submit us to such an ordeal.

Attorneys for the Plaintiffs:—Messrs. Ardesir, Hormusji and Dinsha.

[23] APPELLATE CIVIL.

The 1st January 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE TELANG.

Mukund Harshet, deceased.....(Original Plaintiff) Appellant

• *versus*

Haridas Khemji and another.....(Original Defendants) Respondents.*

Decree—Execution—Agreement not to execute a decree—Suit to restrain execution—Civil Procedure Code (Act XIV of 1882), Sec. 244—Res judicata—Agreement not to execute regarded as satisfaction of decree—Civil Procedure Code (Act XIV of 1882) Secs. 257a, 258, 373.

Mukund and Antaji were partners, and, as such, were indebted to Haridas. Antaji died, and subsequently the debt was settled between Haridas on one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by Mukund to Haridas and for the other moiety by the widow of Antaji. Haridas filed a suit against Mukund and got a decree, which was satisfied. Haridas then sued the widow on her bond. The Court allowed her objection that she was not competent to give a bond binding her sons personally, and of its own accord made Mukund a defendant, and passed a decree against Mukund and Antaji's estate. Haridas assigned this decree to Ramchandra, who applied for execution against Mukund. Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction against the execution of the said decree and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree had been passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree were passed, he would not execute it. The Lower Appeal Court rejected the plaint, holding (1) that as between the plaintiff Mukund and the defendant Ramchandra the question in issue was *res judicata*, and (2) that there was no cause of action against the defendant Haridas. On appeal to the High Court,

Held that, as between Mukund and Ramchandra, the suit was not *res judicata*. The alleged agreement by its very terms provided for the event of the decree being passed, and was only intended to prevent its being executed.

Chenvirappa v. Puttappa, I. L. R. 11 Bom., 708, distinguished.

It having been urged that the question was one which could be decided in execution, and that under section 244 of the Civil Procedure Code (Act XIV of 1882) the present suit would not lie, *and*, that the words "relating to execution" in section 244 must be restricted to "the contents of the order made, or to how far it has been carried out," and do not, therefore, include an agreement not to execute the decree.

It being further contended that the agreement raised a question as to the "satisfaction" of the decree, and was, therefore, void without the sanction of the Court,

[24] *Held*, that the satisfaction contemplated by section 244 must have arisen out of some transaction between the parties subsequent to the decree.

THIS was a second appeal from the decision of R. S. Tipnis, Acting District Judge of Ratnagiri.

Mukund and Antaji were partners, and as such were indebted to the defendant Haridas Khemji. Antaji died, and after his death the debt was settled by Haridas on the one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by

* Second Appeal No. 819 of 1890.

Mukund to Haridas, and for the other moiety a separate bond was given by Antaji's widow. Haridas sued Mukund on his bond, and obtained a decree, which was satisfied. He then sued the widow on her bond. She contended that she was not competent to give a bond binding her sons personally. The Court allowed this objection, and of its own accord made Mukund a defendant in the suit, and passed a decree against him and Antaji's estate. Haridas assigned this decree to the defendant Ramchandra, and Ramchandra applied for execution against Mukund. Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction to prevent Ramchandra from executing the decree against him and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree was passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree were passed, he would not execute it. The Subordinate Judge allowed the claim, granted the injunction sought for, and damages in the event of the decree being executed. On appeal the Court rejected the plaint on the ground that as between Mukund and Ramchandra the question raised by the suit was *res judicata* and that there was no cause of action against Haridas. The plaintiff appealed to the High Court.

Mahadev Chimnaji Apte for the Appellant:—When we produced the agreement upon which we seek in the execution proceedings, the Court held that it would not then take it into consideration. The Court having taken that view it is not now open to the respondents to say that we must seek relief in the execution proceedings. We have a right to bring a separate suit [25] on the agreement in question for the purpose of restraining execution of the decree—*Dhuronidhur Sen v. Agra Bank*, 1 L.R., 4 Cal., 380. The Court can set aside a wrong order passed in the execution of a decree and pass a fresh one—*Delhi and London Bank v. Melmoth A. D. Orchard*, L.R., 4 I.A., 127.

The provisions of section 244 of the Civil Procedure Code (Act XIV of 1882) are not applicable to the present case. That section relates to proceedings in execution. But our contention is that the decree of which we seek to stop execution, cannot be executed at all. Section 244 is inapplicable to a case which involves a question as to whether the execution of a decree can or cannot be had. Questions like this cannot be opened in execution proceedings—*Sudindra v. Budan*, 1 L.R., 9 Mad., 80. The remarks in the judgment in *Sakharam v. Govind*, 10 Bom. H. C. Rep., 361, support our contention. Our case is that the effect of the agreement we rely upon is to make the decree, so far as we are concerned, a nullity.

If the Court is against us on this point we contend that the agreement in dispute operates by way of satisfaction of the decree and, therefore, our right to bring a suit is not taken away by section 244 of the Civil Procedure Code—*Nubo Kishen Mookerji v. Debnath Roy Chowdhry*, 22 W.R., 194 Civ. Rul.; *Nijsem Mullick v. Erfan Mollah*, 22 W.R., 298 Civ. Rul.; *Chukroo Singh v. Jowahir Singh*, 19 W.R., 152 Civ. Rul.; *Meer Mahomed v. Khetoo Debee*, 20 W.R., 150 Civ. Rul.; *Ishan Chundar v. Indro Narain*, 1 L.R., 9 Cal., 788.

Ganesh Ramchandra Kholoskar for the Respondents:—The question which arises in this case is one which can be determined in the execution proceedings, and ought not to be raised in a separate suit. There are authorities to show that provisions of law relating to the execution of a decree should be construed liberally so as to save litigants from the expenses of a separate suit—*Oseemunissah Khatoon v. Ameeromunissa Khatoon*, 20 W.R., 162 Civ. Rul. The appellants have relied upon the remarks in *Sakharam v. Govind*, 10 Bom. H. C. Rep., 361, but that case does not lay down that a separate suit will lie. It has [26] been held in several cases that questions relating to the fraudulent execution of a

decree can be entertained in execution proceedings—*Subbaji Rao v. Srinivasu Rau*, I. L. R., 2 Mad., 264; *Viraraghava v. Venkatacharyar*, I. L. R., 5 Mad., 217; *Ballodeb Lall v. Anadi Mohapattur*, I. L. R., 10 Cal., 410; *Paranjpe v. Kanade*, I. L. R., 6 Bom., 148. The words of section 244 of the Civil Procedure Code are wide enough to include the question whether a decree can be executed or not—*Mohiullah v. Imami*, I. L. R., 3 All., 229. In support of our argument that the appellants must seek relief in the execution proceedings, and not in a separate suit, we rely upon the rulings in *Woomatara Debia v. Unnopoorna Dassee*, 11 Beng. L. R., 158, Privy Council; *Sakharam v. Damodar*, I. L. R., 9 Bom., 468. The decision in *Param Singh v. Lalji Mal*, I. L. R., 1 All., 403, is against us, but it has been dissented from by our High Court in *Chenvirappa v. Puttappa*, I. L. R., 11 Bom., 708.

If the Court be against us on the above points, then we would support the decree of the lower Court on the ground of *res judicata*—*Kalimandal v. Kadjarnath*, 6 Cal. L. R., 215.

Lastly we submit that, if the agreement in suit be looked upon as a compromise, satisfaction or adjustment of the decree, it cannot be taken into consideration without the sanction of the Court under sections 257A, 258 or 375 of the Civil Procedure Code.

[TELANG, J.:—But a suit for specific performance can lie under section 375. See *Ruttonsey v. Pooribai*, I. L. R., 7 Bom., 304.]

The judgment of the Court was delivered by

Sargent, C. J.:—According to the facts found by the Court, Mukund and Antaji were partners in a trade, in respect of which a debt was due to the first defendant Haridas. After Antaji died, the debt was settled between Haridas on the one side and Mukund and Antaji's widow, as guardian of his minor sons, on the other, by which the balance was fixed at 1,100 rupees, and both Mukund and Antaji's widow passed bonds for 550 rupees to Haridas. Haridas obtained a decree against Mukund on his [27] bond, which was satisfied, and he then sued Antaji's heirs. The Court allowed the widow's objection that she was not competent to give a bond binding her sons personally, and of its own accord made Mukund a defendant and passed a decree against him and Antaji's estate. Haridas assigned this decree to the second defendant Ramchandra, who applied for execution against Mukund. The present suit is brought by Mukund to restrain the second defendant from executing the decree, alleging that during the pendency of the above suit Haridas agreed with him that he would not get a decree against him, and, in the event of its being passed against him, he would not execute it. The plaintiff also claims damages from the first defendant Haridas.

The Subordinate Judge granted an injunction as prayed for, and ordered that, in the event of execution, the plaintiff should recover from the defendants the amount realized under the decree with 12 annas per cent. per mensem. The lower Court of appeal rejected the plaint, on the ground that the question in issue in this suit as between plaintiff and second defendant was *res judicata* by the decree in the above suit, and that there was no cause of action for damages as against Haridas. The Court relied on the judgment of WEST, J., in *Chenvirappa v. Puttappa*, I. L. R., 11 Bom., 708, at p. 722. In that case the plaintiff sought to restrain execution of an *ex parte* decree for possession passed on a deed of conveyance to which he said he had submitted, because the defendant had expressly engaged after the conveyance that plaintiff's possession should not be disturbed. Mr. Justice WEST considered that "the above undertaking ought to have been pleaded against the defendant's claim, and could not be made the basis of a separate suit." But there, the agreement

between the parties was directly at variance with the decree for possession which the defendant obtained in the former suit, and of course might have been pleaded in that suit. Whilst here the defendant says: "I will not execute the decree against you. I will get the decree satisfied by Antaji," and the agreement, therefore, by its very terms provides for the decree being passed, and is only intended to prevent its execution. We think, therefore, that the District Judge was wrong in disposing of the case on the ground of *res judicata*.

[28] It was also contended for the respondents that the matter was one which should have been decided in execution, and that under section 244 of the Civil Procedure Code (Act XIV of 1882) a suit would not lie. The words "relating to execution" in section 244 of the Civil Procedure Code are doubtless very general, but they must be restricted, as pointed out by the Court in *Sakharam v. Govind*, 10 Bom. H. C. Rep., 361, to "the contents of the order made or to how far it has been carried out," and do not, therefore, include an agreement, such as the present one, not to execute the decree. It is to be observed that in *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry*, 22 W. R., 194, Civ. Rul., it was not suggested that a suit would not lie by reason of section 11 of Act XXIII of 1861, although the agreement not to execute was subsequent to the decree. It was said indeed that the agreement raised a question as to the "satisfaction" of the decree, but the satisfaction contemplated by section 244 must have arisen out of some transaction between the parties subsequent to the decree.

We must, therefore, reverse the decree of the Court below dismissing the plaint as against the second defendant, and remand the case for a decision on the merits as against the second defendant. The plaintiff not having taken any objection by his second appeal against the part of the decree of the Court below dismissing plaintiff's claim for damages against defendant No. 1, the decree will of course stand as regards that claim. Costs of this appeal to abide the result.

Decree reversed.

NOTES.

[As regards the effect of an agreement not to execute the decree, see also (1902) 6 C.W.N., 796; (1898) 22 Bom., 463; (1896) 22 Bom., 26; (1894) 5 M.L.J., 140; (1893) 21 Cal., 437.]

[29] APPELLATE CIVIL.

The 11th January, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD

Ramkrishna Moreswar and others.....(Original Plaintiffs) Appellants
versus
 Ramabai and another.....(Original Defendants) Respondents.*

Practice—Parties—Non-joinder of parties—Application to join necessary parties refused by Court of First Instance—Appeal—Application granted by Court of Appeal—Order to add parties operating nunc pro tunc—Delay the act of the Court—Limitation.

The plaintiffs, as sharers in certain rent alleged to be due by the defendants, sued to recover their share. The defendants contended that all the co-sharers were necessary parties. At the hearing on the 24th January 1889, the plaintiffs' co-sharers applied to be made co-plaintiffs, and to be allowed to adopt what the plaintiffs had done in the suit. The application was rejected, and the suit was dismissed for want of parties. On appeal, the District Court in July 1890, holding that the lower Court ought to have joined the co-sharers, passed an order making them co-plaintiffs, and then confirmed the lower Court's decree on the ground that at the time (3rd July 1890) the co-sharers were made plaintiffs the suit was barred by limitation. On appeal to the High Court,

Held, remanding the case, that the order of the lower appeal Court of the 3rd July 1890, allowing the co-sharers' application, which had been made on the 24th January 1889, but had been refused by the Court of First Instance, should be treated as operating *nunc pro tunc*, and that the co-sharers should be regarded as having been made parties to the suit when their application was made. The delay was attributable to the act of the Court, and the plaintiffs should not suffer from it.

THIS was a second appeal from the decision of Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Ratnagiri with appellate powers.

The plaintiffs, Ramkrishna Moreswar Kanvinde and others, as co-sharers in rent due from defendants for a certain *thikan*, sued the defendants to recover the said share.

Defendant No. 1, Ramabai, did not appear.

Defendant No. 2, Krishnaji Ramchandra Thakur, admitted his liability to pay half the amount of rent to all the Kanvinde sharers, but contended that, as the plaintiffs' co-sharers were not joined, the suit was not maintainable.

[30] At the hearing of the suit in January 1889, the plaintiffs' co-sharers came in and applied to be made parties and to be allowed to adopt what the plaintiffs had done therein. The Court of First Instance rejected the application, and dismissed the suit for want of parties. In his judgment the Subordinate Judge made the following remarks:—

"The application for the joinder of parties has been made at a very late stage, and their joinder is likely to involve a question of limitation as regards a part of the claim. As no satisfactory cause was assigned for the omission to join them in the plaint itself, or at the proper time, it became the duty of the Court to reluctantly reject the application."

The plaintiffs appealed to the District Court, which having held that the plaintiffs' co-sharers ought to have been joined in the suit on their application,

* Second Appeal, No. 798 of 1890.

passed an order for their joinder, and confirmed the Subordinate Judge's decree, on the ground that, at the time the co-sharers were joined as co-plaintiffs, the claim was time-barred.

Against the decree of the District Court the plaintiffs appealed to the High Court.

Maneksha Jehangirsha Taleyarkhan, for the Appellants:—The lower Court was wrong in dismissing our claim on the ground that it was time-barred when the other co-sharers were joined as co-plaintiffs. First of all, we contend that there was no necessity to join them in the suit. Defendant No. 2 had, no doubt, in his written statement objected to the maintenance of the suit on account of non-joinder, but no issue was raised on that point in the Court of First Instance, and, therefore, the objection must be deemed to have been waived—*Trimbak Vithal v. Vishnu Maheshwar*, P. J., 1887, p. 6. Next we contend that, even supposing that there was no waiver, the application was originally made within the period of limitation, and, if it had been granted, and the parties had been joined when it was made, our claim would not have been time-barred. Our application was made in time, but the Court delayed the consideration of the matter, and [31] when it came to the conclusion that the application should be granted, our suit was time-barred. We, therefore, submit that the order of the Court allowing the application should be treated as made *nunc pro tunc*. The Court ought to have joined the co-sharers as parties at the time when we made the application. The delay on the part of the Court should not be allowed to prejudice our interest. We could do nothing more than make the application. The joinder of a party is the act of the Court for which a party cannot be held responsible. The application being made in time, we submit that the co-sharers should be considered to have been joined in time also.

Ganesh Krishna Deshamukha, for the Respondents:—In the first place, we do not admit that the application was made within time.

[SARGENT, C. J.:—But the Court seems to have assumed that it was made in time.]

According to the deposition of the plaintiff, the whole claim was barred when the application for joinder was made. One of the reasons given for the rejection of the application is that it was made at a very late stage of the suit,—that is, five days before judgment. Moreover, the application was not made by the original plaintiffs; it was made by the co-sharers themselves, and when the Court rejected it, the plaintiffs ought to have presented another application to bring their co-sharers on the record. We, therefore, submit that there was no proper application for joinder. It seems, as remarked by the District Judge in appeal, that the original plaintiffs acquiesced in the application, because it was their own pleader who made the application after receiving a *vakalatnama* from the co-sharers.

With respect to the point of limitation, we contend that the co-sharers cannot be considered to have been parties to the suit prior to their joinder; and, as they were joined after the statutory period for the suit had expired, the suit was time-barred.

There was no waiver of the objection as to want of parties. It is true that in the Court of First Instance there was no distinct issue raised on the point; still the objection was taken in our [32] written statement, and the judgment of that Court shows that there was argument on the point.

Sargent, C. J.:—The lower appeal Court has held that the plaint was barred because the co-sharers in the rent were not made parties until they were made so by its decree on the 3rd July 1890. But we think that, as the

co-sharers made their application during the hearing of the suit, as far back as 24th January 1889, to be allowed to adopt what the plaintiff had done and to be made co-plaintiffs, its order allowing the application, which had been refused by the Court of First Instance, should be treated as operating *nunc pro tunc*, and that the other sharers should be regarded as having been made parties to the suit when that application was made. The delay between 24th January 1889, when the application was made, and the decision of the Court of appeal was attributable to the act of the Court, and the appellants should, therefore, not suffer from it (Broom's Legal Maxims, 6th Ed., page 117).

We must, therefore, reverse the decree and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed.

NOTES.

[See also (1894) 19 Bom., 807 at 809; (1906) P. R., 127.]

[17 Bom. 32]

APPELLATE CIVIL.

The 12th January, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Sidu..... Plaintiff

versus

Bali and others..... Defendants.

Mortgage—Redemption suit—Costs due by mortgagee to mortgagor—Set off against the mortgage-debt—Balance remaining due to mortgagor—Liability of mortgagee—Civil Procedure Code (Act XIV of 1882), Sec. 224.

The mortgagor is entitled to set off or deduct the amount of costs payable to him, under the decree against or from the mortgage-debt payable by him. If the amount of the costs be larger than the mortgage-debt, the mortgagor is entitled to obtain possession at once of the mortgaged property and to recover the balance against the mortgagee.

[33] THIS was a reference made by Rao Saheb Anant Gopal Bhawe, Subordinate Judge of Khatav in the Satara District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts which gave rise to the reference were as follows : —

The plaintiff, Sidu, having obtained a decree for redemption of certain immoveable property on payment of Rs. 20 to the defendant Bali within six months, paid the said amount into Court within the appointed time, and recovered possession of the property through Court. Before the amount was paid to the defendant, the original decree was reversed by the Special Judge, and consequently on the application of the defendant the property was delivered back into his possession, and the redemption money paid by the plaintiff into Court was returned to him. Subsequently the High Court, reversing the decree of the Special Judge, restored that of the Court of First Instance, and ordered the defendant to pay costs throughout. After six months

Civil Reference, No. 15 of 1891

from the date of the decree of the High Court had expired, the plaintiff made an application for execution of the decree, in which he sought to set off the amount of redemption money due from him against the amount of costs which were payable to him by the defendant, and to recover the balance by attachment of the moveable property of the defendant, and also to recover possession of the mortgaged property.

The Subordinate Judge entertained doubt on the following questions, which he submitted for consideration :—

"(1) Whether the amount of redemption money payable under the decree by the plaintiff to the defendant can be set off against the amount of costs awarded to the former against the latter ?

"(2) Whether the plaintiff's right of redemption was foreclosed by reason of his having failed either to pay into Court the amount of redemption money, or to obtain an order for setting off the said sum against the amount of costs due to him from the defendant, and for compelling him to enter satisfaction upon the decree within the aforesaid period of six months ?

[34] "(3) If the plaintiff's right to redeem is found to be foreclosed, can he still enforce the order of costs against the defendant ; or, in other words, will it survive ?"

The Subordinate Judge's opinion on the first two points was in the affirmative, and he expressed no opinion on the third.

Further on in the reference the following question was framed for submission :—

"Whether it was not necessary for the plaintiff to apply to the Court, within the period of six months granted to him by the decree for payment of the mortgage amount, for an order allowing the set-off and declaring him to be entitled to recover possession of the mortgaged property from the defendant at any time of course within the prescribed period of limitation ?"

On the above question the opinion of the Subordinate Judge was in the affirmative.

There was no appearance for the parties in the High Court.

Sargent, C. J. :— We think that section 221 of the Civil Procedure Code (XIV of 1882) is applicable to a case of this description, and we agree with the decision of the Calcutta High Court in *Brijnath Dass v. Juggernath Dass*, I. L.R., 4 Cal., 742, that the mortgagor is entitled to set off or deduct the amount of the costs payable to him under the decree against or from the mortgage-debt payable by him. If that be so, and if the costs, as in this case, are of larger amount than the mortgage-debt, the mortgagor is entitled to obtain possession at once of the mortgage property and to recover the balance of the costs against the defendant.

Order accordingly.

NOTES.

[See also (1901) 16 C. P.L.R., 73.]

[35] APPELLATE CIVIL.

The 18th January, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE TELANG.

Kachar Ala Chela.....(Original Defendant and Opponent) Appellant
versus
 Sha Oghadbbhai Thakarshi.....(Original Plaintiff and Claimant) Respondent
 and
 Sha Oghadbbhai Thakarshi.....(Original Plaintiff and Claimant) Appellant
versus
 Kachar Ala Chela.....(Original Defendant and Opponent) Respondent.*

Decree—Execution of decree—Mesne profits, ascertainment of—Duty of the Court—Deductions claimed—Res judicata.

Where a decree awarded mesne profits of the lands claimed in the suit, and the Court declined, in execution of the decree, to investigate questions relating to deductions claimed by the defendant, on the ground that to do so would be "to go behind the decree," and that it was not competent to the Court to do that in executing the decree.

Held, that the mesne profits could only be ascertained after making deductions from the gross earnings for all such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession. It was, therefore, the duty of the Court executing the decree to inquire into the payments which the defendant alleged he had made, and also to determine the question, whether, as alleged by the plaintiff, the lands forming the subject-matter of the suit were rent free.

The Court having awarded a particular sum as annual mesne profits without setting forth in the judgment the details thereof, and it having, therefore, become impossible to say that the right to a particular deduction therefrom claimed by the defendant was adjudicated on by the Court,

Held, that the rule of *res judicata* did not apply to the question as to the payment by the defendant.

THESE were cross-appeals from an order passed by E. M. H. Fulton, District Judge of Ahmedabad, in execution of a decree.

The facts of the case were as follows:—

The plaintiff, Sha Oghadbbhai Thakarshi, brought a suit in the District Court at Ahmedabad to recover possession of 423 acres and 15 gunthas of land situate at the village of little Matra, in the Dhandhuka Taluka, alleging that he had purchased the land in execution of a decree against Giga Uga and Hatia Giga and had obtained possession, but was forcibly dispossessed by the defendant. The plaintiff also sought to recover Rs. 4,200 as mesne profits for three years preceding the suit.

[36] Defendant, Kachar Ala Chela, Chief of Jasad, denied that he had forcibly dispossessed the plaintiff, and alleged that the land did not belong to the plaintiff, or to Giga Uga, or to Hatia Giga, and that they never had possession.

The District Judge (J. W. Walker) passed a decree directing the plaintiff to recover possession of a portion of the land claimed by him and also to recover Rs. 2,100 as mesne profits for the three years preceding the suit, with mesne profits from the institution of the suit to the time of obtaining possession. The rest of the plaintiff's claim was rejected.

* Cross Appeals, Nos. 23 and 79 of 1891.

Against the decree of the District Court the defendant appealed, to the High Court, and the plaintiff presented cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882). The High Court confirmed the decree. See P. J., 1889, p. 222.

After the confirmation of the decree by the High Court, the plaintiff applied in execution for the recovery of *mesne profits*. The defendant claimed certain deductions and produced a document which he contended showed that he was entitled to make these deductions. The District Judge refused to allow any deductions, on the ground that to do so would be to go behind the decree, which made no provision for any allowances to the defendant. In making his order he said :—

"I must reject this document as irrelevant to the present inquiry. We cannot go behind the decree. Mr. Varajrai, (defendant's pleader), argues that, according to the terms of Exhibit 148, *Hatia Giga* was not entitled to the *santi vero* and *kharajat* leviable on a portion of the land in dispute. He contends, therefore, that, as the plaintiff's title is derived from *Hatia Giga*, he cannot recover this *vero* and *kharajat* for which allowance must be made to the defendant in the computation of *mesne profits*. The answer to this argument is that the decree finally determines the rights of the parties, and it awards the land to the plaintiff without any reservation on account of *vero* and *kharajat*. If there was any mistake in the decree, the proper steps should have been taken to get it amended. In execution no evidence, therefore, can be received to show that the defendant is entitled to allowance for *vero* and *kharajat*.

"Similarly no deduction can be made on account of the proportion of Government assessment, which, it is argued, ought to fall on the plaintiff's land. Mr. Narbheram, (plaintiff's pleader), contends that, owing to certain circumstances, the plaintiff's predecessor was entitled to hold his land free of contribution for Government assessment, but that is a question to which I cannot enter without going behind the decree. The *jama* of the village is paid in a lump by the defendant, and, if he was entitled to recover contribution from the plaintiff, he should have taken steps to get the right expressly declared by the decree. Instead of this, when the plaintiff in his plaint specified the *mesne profits*, the defendant does not seem, in his written statement, to have asked to set off any portion of the *jama*. He denied the plaintiff's claim *in toto*, but did not specially plead for reduction of *mesne profits* on account of assessment. Consequently, when the judgment was written, no allowance seems to have been made for assessment. Under these circumstances no allowance can now be made in execution.

"Similarly with regard to local funds. As the decree does not entitle the defendant to contribution for the cess that may be levied from him by Government, no allowance can be made in execution. Whether by representing the matter properly the defendant can obtain a reduction of local-fund cess with which he is charged under section 7 of Bombay Act III of 1869, is a question which I need not discuss; but, in any case, there seems no doubt that under Mr. Walker's decree he is not entitled to credit from the plaintiff for any payments which he may have made."

The final order passed by the District Judge ran thus :—

"Mr. Walker fixed the *mesne profits* at Rs. 700 per annum for the years prior to the suit and his decision was confirmed on appeal. I think the same sum may now be fixed. I, therefore, direct that for the (*Samvat*) years 1941, 1942, 1943, 1944 and 1945, the plaintiff do recover *mesne profits* at the rate of Rs. 700 per annum, *i.e.* Rs. 3,500 in all.

[38] Against the said order, the defendant and the plaintiff presented cross appeals, Nos. 23 and 79 of 1891, respectively.

.. *Latham* (Advocate-General with *F. R. Vicoji* and *Rao Saheb Vasudev Jagannath Kirtikar*) for Giga Uga, appellant in Appeal No. 23 and respondent in Appeal No. 79 :—The lower Court erred in omitting to deduct the amount of Government assessment and local-fund cess from the profits of the property in dispute. If the decree-holder had been in possession, he would have been liable to pay the cess and the assessment. We have paid these during the period of our management, and we are entitled to this deduction—*Mayne on Damages*, 4th Ed., p. 420. The lower Court held that because the decree does not provide for a deduction on this account, we are not entitled to it. But when the decree was passed, the present question had not arisen. It is, therefore, open to us to raise it now in execution proceedings. The same may be said as to our right to the *vero* and *kharajat*.

— *Branson* (with *Ganpat Sadashiv Rao*) for *Sha Oghadbbhai*, respondent in Appeal No. 23 and appellant in Appeal No. 79 :—To allow the appellant to raise in the execution proceedings the questions about the assessment and the local cess, the *vero* and the *kharajat*, would be to go behind the decree. These questions were either raised before the judgment, or they were not. If raised, the decree decided the questions against the appellant. If not, he cannot raise them now. The decree is a final and complete adjudication of the rights of the parties, and it cannot be varied in execution. In awarding mesne profits, the lower Court has omitted to award them for two years with interest thereon.

Sargent, C. J. :—We think that the District Judge was wrong in not investigating the questions between the parties relating to the deductions claimed by the defendant on account of the Government assessment and local cess paid by him and also on account of the *vero* and *kharajat* payments. The learned Judge was of opinion that to investigate these questions would be "to go behind the decree," and that it was not competent to him to do that in the course of the execution of the decree. The decree, however, awarded the plaintiff mesne profits of the lands claimed [39] in the suit, and such profits can only be ascertained after making deductions from the gross earnings for all such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession. It is hardly necessary to cite authorities for this proposition, but reference may be made to those which were relied on by the Advocate General. See *Mayne on Damages*, 4th Ed., p. 420, and the cases there cited. It was, therefore, the duty of the Court executing the decree to inquire into the payments which the defendant alleged he had made on this account, and also to determine the question whether, as alleged by the plaintiff, the lands forming the subject-matter of the suit were rent-free.

As regards the other question touching the *vero* and *kharajat* payments, it cannot be said that was determined by the decree. The defendant's case on that point would have afforded no proper defence to the suit as a suit in ejectment. No doubt, there was a prayer for mesne profits also made in the plaint, and that prayer was granted by the Court. But the details of the item of Rs. 700 allowed by the Court as the annual mesne profits of the lands, are not set forth in the judgment of the Court, and it is, therefore, impossible to say that the right to this particular deduction claimed by the defendant was adjudicated on by the Court. In a very recent case of *In re Browne and Wingrove; ex parte Ador*, (1891) 2 Q. B., 574, at p. 578, the debtors, who had jointly guaranteed to one Ador the payment with interest of a sum of £1,000 lent by him, presented a bankruptcy petition on which a receiving order was made, and ultimately a scheme of arrangement with the creditors was approved of by the

Court. * * * Ador tendered a proof under the scheme for £1,000 principal and £11-16-8 interest down to the date of the receiving order. The trustee under the scheme rejected the proof as regarded the interest, and allowed it for the principal only, on the ground that the debtors had not guaranteed the payment of interest. Ador did not appeal from this rejection. On the case coming up before the Court of Appeal to determine for what amount Ador could prove, and how the dividend payable was to be calculated, it was argued for the [40] trustee under the scheme that the matter of the claim for interest was *res judicata* "by reason of the trustee's rejection of the proof for £11-16-8 interest and the appellant's omission to appeal against the rejection" within the time allowed. But LINDLEY, L. J., having held that the guarantee extended to the interest as well as the principal, proceeded to say: "It was contended that an order had been already made, which was inconsistent with this view, and that, that order not having been appealed from, it was not competent to the appellant to contend that the interest was guaranteed. The order in question, however, related only to a sum of £11-16-8 for interest up to the date of the receiving order, and the appellant is content to have that sum rejected. The point now before the Court is a totally different one, and ought to be decided upon its merits, although that course unquestionably renders it necessary to reconsider the construction of the letter in question." In the present case, there is even less ground than there was in *ex parte Ador* for applying the rule of *res judicata*, because there is not here any evidence to show that the question as to the payments in question was in truth adjudicated on by Mr. Walker. And there is, of course, no attempt now on the part of the defendant to get rid of the order to pay Rs. 700 per annum as mesne profits for the period to which Mr. Walker's order in terms applies.

The order of the Court below must, therefore, be reversed, and the matter remitted for the mesne profits to be ascertained according to the principles now laid down. In the view, which we have taken, we have not considered it necessary to hear any argument with respect to the other objections of the appellant to the order of the Court below. But the parties agreeing to this course, we direct that the Court below should take an account of the mesne profits for the years 1945 and 1946 in the present proceeding, and that interest should be allowed to the plaintiff on the amount of mesne profits which the Court may award. Costs including the costs in this Court to be dealt with by the Court below.

Order reversed.

[41] APPELLATE CIVIL.

The 21st January, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Vithal Hari Athavle.....(Original Plaintiff) Appellant

versus

Govind Vasudeo Thosar.....(Original Defendant) Respondent.*

Claim for interest from institution of suit until payment—Stamp—Future mesne profits—Court Fees Act (VII of 1870), Sec. 7.

No additional stamp is required on account of the claim for interest from the date of the institution of the suit until payment. It stands on the same footing as future mesne profits, which do not fall under section 7 of the Court Fees Act (VII of 1870).

THIS was a reference made by C. E. G. Crawford, District Judge of Thana, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case were as follows :—

The plaintiff, Vithal Hari Athavle, constituted attorney of one Hari Mahadeo Athavle, sought to recover from the defendant Rs. 457-8-0 due on a mortgage, and claimed interest on the mortgage amount from the date of the institution of the suit till payment.

The defendant, Govind Vasudeo Thosar, admitted the mortgage and pleaded payment of Rs. 67-8-0, which, he alleged, was not given credit for by the plaintiff.

The Subordinate Judge found the payment of Rs. 67-8-0 proved, and awarded the plaintiff's claim for the rest of the amount with interest up to date of the plaint.

The plaintiff appealed to the District Court on certain grounds, one of which was that he was entitled to interest up to date of payment.

The respondent's pleader objected to the raising of the above point, unless a Court-fee was paid for the amount claimed under it.

The District Judge, thereupon, submitted the following question for the opinion of the High Court :—

"Is a Court-fee leviable, in this appeal, in respect of appellant's claim for interest after date of plaint?"

[42] The District Judge's opinion was that the precise amount of interest claimable not being ascertainable until the date of payment is known, special provision would have been made for the case, as has been done for mesne profits in section 11 of the Court Fees Act, (VII of 1870) had it been the intention of the Legislature that a Court-fee should be levied in such a case. On the other hand, he considered that it might fairly be argued that the interest is part of the subject-matter of the appeal, at least in cases like the present, where the principal and some interest up to date of plaint has been awarded, the case then ceasing to be similar to that of the original claim for interest under section 209 of the Civil Procedure Code, inasmuch as the claim becomes one for interest separately from that for the principal.

There was no appearance for the parties in the High Court.

Civil Reference, No. 18 of 1891.

Sargent, C. J. :—We think that no additional stamp would be required on account of the claim for interest from institution of the suit until payment. It stands on the same footing as future mesne profits, which in *Ramkrishna v. Bhimabai*, P. J., 1890, p. 364, were held not to fall under section 7 of the Court Fees Act.

Order accordingly.

[17 Bom. 42]
APPELLATE CIVIL.

The 26th January, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Damodar Gopal Dikshit.....(Original Defendant) Appellant
versus
Chintaman Balkrishna Karve and others.....(Original Plaintiffs) Respondents.*

*Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Cls. (4) and (31); Sec. 23 Cl. (1)—Jurisdiction—Suit to recover share of profits of *nam* villages—Money had and received for plaintiffs' use.*

In a suit for the recovery of a certain share in the profits of *nam* villages, of which the defendant was the manager, the only relief claimed by the plaintiffs being payment of money, namely Rs. 130,

Held, that the suit was for money had and received for plaintiffs' use, and was cognizable by the Court of Small Causes. It did not fall under clause (4) of Schedule II of the Provincial Small Cause Courts Act (IX of 1887), as it was not [43] a suit for the possession of immoveable property, or for recovery of an interest in such a property. If the plaintiffs had alleged that the defendant had "wrongfully received" the plaintiffs' share of profits, then the suit would have fallen under clause (31), Schedule II of the Act.

THIS was an appeal against an order of remand passed by A. D. Pollen, District Judge of Poona.

Suit to recover a share of the profits of *nam* villages.

The plaintiffs, Chintaman Balkrishna Karve and others, stated that the two villages in dispute belonged to the families of the parties as *nam*; that the plaintiffs had one-fifteenth share therein, that the defendant, Damodar Gopal Dikshit, had the management thereof, and that they claimed to recover Rs. 130 from the defendant as their share of the profits for three years.

The defendant, Damodar Gopal Dikshit, resisted the suit on the ground that it was time-barred; that Vishnu Dikshit, whose heirs the plaintiffs claim to be, had no share in the property in dispute; and that the Court had no jurisdiction to entertain the suit.

The Subordinate Judge (Rao Sahib Vaman M. Bodas), in whose Court the suit was originally instituted, held that it was within the cognizance of the Court of Small Causes at Poona, and dismissed it for want of jurisdiction.

The plaintiffs appealed to the District Court, which held that the jurisdiction of the Small Cause Court was barred by Schedule II, articles (4) and (31) of the Provincial Small Cause Courts Act (IX of 1887), and reversed the decree, and remanded the suit for trial on the merits.

Against the order of remand the defendant appealed to the High Court.

Balkrishna Narayan Bhanekar for the Appellant :—The suit relates to the recovery of money, and that was the only prayer of the plaint. The District

Judge was wrong in holding that in the present suit the respondents wanted to establish their right to the income of the property. In the plaint they asked for Rs. 130 on account of their share in the income, and nothing more; and that being so, the case falls within the cognizance of the Court of Small Causes at Poona. The plaintiffs [44] did not seek to recover, or establish, their right to any immoveable property over which the Small Cause Court has no jurisdiction.

[BIRDWOOD, J., referred to *Gulam Nabi v. Shahabudin*, P. J., 1885, p. 14.]

That case supports our contention; so also the ruling in *Krishnaji v. Gangaram*, P. J., 1890, p. 255.

Purushottam Parashuram Khare for the Respondents:—The view taken by the District Judge is correct. We say in our plaint that we have got a fifteenth share in the property and the income, and the appellant denies our right to a share in the property. The pleadings in the case, therefore, raise a question of title, which the Small Cause Court has no jurisdiction to entertain. The Judge also relied on articles (4) and (31) of Schedule II of the Provincial Small Cause Courts Act (IX of 1887), and was of opinion that the claim related to an interest in immoveable property.

***Sargent, C. J.**:—The plaintiffs sued to recover their one-fifteenth share of the profits of two *inam* villages which had been collected by the defendant as the representative of the eldest branch of the family of *inamdars*, and as manager of the property for the several sharers. The Subordinate Judge dismissed the claim, as he was of opinion that the suit was within the cognizance of the Court of Small Causes, and that he had no jurisdiction.

The District Judge has, however, held that the case falls under clauses 4 and 31 of Schedule II of Act IX of 1887, and is, therefore, excepted from the cognizance of a Court of Small Causes; and he has remanded the case for trial by the Subordinate Judge. We are unable to concur in this decision. The suit is one for money had and received to the plaintiffs' use. It does not fall under clause 4 of Schedule II of Act IX of 1887, as it is not a suit for the possession of immoveable property, or for the recovery of an interest in such property; the only relief claimed being the payment of money. If the plaintiffs had alleged that the defendant had "wrongfully received" the plaintiffs' share of profits, then, no doubt, the suit would have fallen under clause 31 of the Schedule II. But the [45] plaintiffs' allegation is that the defendant rightfully received, but wrongfully retained, the profits. To such a suit clause 31 has no application (*cf. Krishnaji v. Gangaram*, P. J., 1890, p. 255). The suit, as brought, is cognizable by a Court of Small Causes. If the plaint is now proceeded with in such a Court, and the defendant denies the plaintiffs' title, it would be open to the Court to act under section 23, clause (1) of Act IX of 1887.

We reverse the order of the Lower Appellate Court and direct that the plaint be returned to the plaintiffs for presentation in the Court of Small Causes. The parties to pay their own costs of this appeal. Other costs to be costs in the cause.

Order reversed.

NOTES.

[This was followed in (1901) 23 All., 457; (1895) 21 Bom., 248; (1900) 25 Bom., 85; (1907) 9 Bom. L.R., 207 n; (1908) 32 Bom., 560; (1909) 34 Bom., 171; (1899) 2 O.C., 276; (1902) P.R., 13; (1903) P.L.R., 98. See also (1903) 14 M.L.J., 396; (1908) 15 M.L.J., 88.]

The 1st February, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Motilal Prannath and others.....(Original Defendants) Appellants
versus

Bai Kashi, widow of Gopal Prannath.....(Original Plaintiff) Respondent.*

Hindu law—Maintenance—Widow's maintenance—Withholding of maintenance—Demand and refusal—Arrears of maintenance—Limitation—Decree providing for reduction of maintenance in event of altered circumstances of persons paying it.

K, a Hindu widow, sued the undivided brothers of her deceased husband for maintenance. She also claimed arrears of maintenance for six years prior to the institution of the suit. The Court of First Instance passed a decree in her favour awarding her maintenance at the rate of Rs. 52 a year during her lifetime, but "subject to variation according to the change in defendants' circumstances for the worse." The Court also awarded her arrears of maintenance for three years only (not six as claimed) on the ground that she was only twenty years old, and had always lived with her father and been maintained by him, and that a formal demand had only been made on the defendant three years previously. On appeal, the District Court increased the rate of maintenance to Rs. 65 per annum, and awarded the plaintiff arrears for six years, holding that the fact of the demand having been made only three years before suit did not prevent her from recovering arrears for six years.

Held by the High Court that although the withholding of maintenance, which constituted the cause of action, might be proved otherwise than by a demand and refusal, yet in this case it had not been shown that there were any circumstances [46] which would amount to a refusal of maintenance. The decree of the lower appeal Court was, therefore, confirmed, except so far as it gave the plaintiff arrears of maintenance for six years, which period was altered to three years. The clauses to the reduction of maintenance in the event of altered circumstances was also struck out.

THIS was a second appeal from the decision of E. H. Moscardi, Acting Assistant Judge with Full Powers, of Broach.

Suit to recover maintenance.

The plaintiff, Bai Kashi, widow of one Gopal Prannath, who died a minor, sought to recover from the defendants, who were the undivided brothers of the deceased, arrears of maintenance for six years prior to the institution of the suit, and also for an order directing that the defendants should continue to pay her maintenance annually in future, and that, in default, she should recover it from their property.

The defendants, Motilal, Lallubhai and Ramchhod Prannath, urged (*inter alia*) that the plaintiff was unchaste; that she had from the time of her husband's death lived with her father, and that, therefore, she was not entitled to recover maintenance.

The Subordinate Judge (Rao Saheb Gulabdas Laldas) found that the allegation as to the plaintiff's unchastity was not proved, and that she was

* Second Appeal, No. 10 of 1891.

entitled to recover future maintenance and arrears thereof only for three years, and not more. He, therefore, made the following order:—

"The order is that the plaintiff do recover from the defendants Rs. 144 for the three years pending the suit and Rs. 48 more for the period until the 16th August 1888, and the defendants do go on paying to the plaintiff her maintenance Rs. 52 (fifty-two) a year during her lifetime, subject, of course, to variation according to the change in defendants' circumstances for the worse, on the 16th August every year from the year 1889, and that, in default of the defendants paying the same, the plaintiff may recover the same from the family property of the defendants."

The reasons assigned by the Subordinate Judge for awarding arrears for three years only were as follows:—

"There is no objection to their award for a longer period on the ground of limitation, but the plaintiff is only twenty years [47] old. She has lived all the time with her father, and been fed by him as her natural protector. No separate accounts for her feed are kept. According to the rules of the caste to which the parties belong, a female does not go to reside permanently with her husband before the age of sixteen. Until then she is simply a visitor at her husband's house, and is, therefore, generally maintained by the parents. Though, as a rule of Hindu law, the female is entitled to be maintained by her husband and his relations from the date of her marriage, it is only in theory; practically she is maintained by them after sixteen years of age. As she has been put to no expenses, and has to contract no debts, the award of a lump sum is simply to enrich her, and, therefore, it should not be for more than three years only.

"Moreover, the maintenance was demanded formally only three years ago from the defendants. This is also one of the principal grounds why she should not get a lump sum as arrears for a longer period."

"Against the decree of the Subordinate Judge both the parties appealed to the District Court, and the District Judge being of opinion that the rate of maintenance awarded by the Subordinate Judge was lower than it ought to have been, and that though the plaintiff had demanded arrears of maintenance only for three years prior to the institution of the suit, still that circumstance did not debar her from getting the arrears for six years, varied the decree by increasing the rate of the arrears, as well as future maintenance, to Rs. 66 per annum and by awarding the arrears of six years.

The defendants appealed to the High Court, and the plaintiff-respondent presented cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

Manekshah Jehangirshah Taleyarkhan, for the Appellants:—Though the respondent had claimed arrears of six years in her plaint, still it was during the three years prior to the institution of the suit that a demand for maintenance was made. We, therefore, contend that the lower Court was wrong in giving her arrears of six years. The Subordinate Judge awarded arrears of three years only, and he has given very good reasons for his doing so. In [48] order that a Hindu widow may be entitled to maintenance, there must be either a demand, or an improper withholding of maintenance from her—*Narayanarao v. Ramabai*, L.R., 6 I. A., 114; *Chanbasapa v. Cholawa*, P. J., 1890, p. 172. The demand was made only three years prior to the institution of the suit, and no improper withholding on our part has been proved.

Chimajlal Harilal Shetalvad, for the Respondent:—Irrespective of any demand or refusal, a Hindu widow is by law entitled to arrears of maintenance

for six years, which is the period allowed by the Statute of Limitation (Act XV of 1877)—*Jivi v. Ramji*, I. L. R., 3 Bom., 207. The lower Courts have not gone into the question as to whether there was any demand and withholding, and we submit that it is not necessary in every case to prove any such demand and withholding.

The lower Courts have not conformed to practice in framing the decree. The clause in the decree as to the reduction of the maintenance, in the event of the appellants' circumstances becoming unfavourable, should be left out.

Sargent, C. J. :—The decision of the Privy Council in *Narayanrao v. Ramabai*, L. R., 6 I. A., 114, shows that a withholding of maintenance, which constitutes the cause of action, may be proved otherwise than by a demand or refusal. But the District Judge, in amending the finding of the Subordinate Judge which limited the arrears to three years, has not found that there were any circumstances which would amount to a refusal of maintenance, as explained in the above decree. We must, therefore, confirm the decree, except so far as it gives the plaintiff arrears of maintenance for six years, which period must be altered to three years. It is not usual to reserve, in express terms in a decree for maintenance, the right of the parties paying the maintenance to ask for a reduction in the amount in the event of altered circumstances. Those words should, therefore, we think, be omitted from the decree. Parties to pay their own costs of this appeal.

Decree varied

NOTES.

[1. In (1900) 24 Mad., 147 at 155 the Privy Council remarked that non-payment of maintenance to a person entitled thereto constitutes *prima facie* proof of wrongful withholding; see also (1901) 16 C.P.L.R., 30.

2. In (1900) 24 Bom., 386; (1900) 13 C.P. L.R., 156, this was referred to as regards the power to reduce amount of maintenance.]

[49] APPELLATE CIVIL.

The 11th February, 1892.

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Gowri.....(Original Defendant) Applicant

versus

Vigneshvar and others.....(Original Plaintiffs) Opponents.

Parties—Practice—Appeal—Appeal by some of the parties to a suit—Decree in appeal binding parties to the suit who were not parties to the appeal—Civil Procedure Code (Act XIV of 1882), Sec. 244, Cl. (c)—Decree—Execution.

The plaintiffs filed a suit in ejectment against A, B and C. The Subordinate Judge decreed the claim. On appeal, the District Judge rejected it. The plaintiffs then preferred a second appeal to the High Court, which finally decided in plaintiffs' favour. To this second appeal the defendant A was not made a party. In execution of the High Court's decree, A was dispossessed, but was restored to possession by the Subordinate Judge under section 332 of the Code of Civil Procedure (Act XIV of 1882). This order was reversed, on appeal, by the District Judge. A thereupon applied to the High Court, under section 622

* Application No. 226 of 1891 under Extraordinary Jurisdiction.

of the Code of Civil Procedure (Act XIV of 1882), to set aside the District Judge's order as *ultra vires*, on the ground that section 244 of the Code was not applicable to the case, A not having been a party to the appeal in which the decree under execution was passed, and that, therefore, no appeal lay to the District Judge from the Subordinate Judge's order.

Held that A being a party to the suit, though not to the appeal in which the final decree was passed, the District Judge had jurisdiction to hear the appeal under section 244, clause (c) of the Code of Civil Procedure.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The opponents filed a suit against Vithal and others, including the present applicant, to recover possession of certain lands, alleging that the defendants were tenants, who had forfeited their tenancy on failure to pay rent. The Subordinate Judge passed a decree awarding possession to the plaintiffs.

Against this decision the defendant Vithal alone appealed to the District Judge, who reversed the decree of the Subordinate Judge.

Thereupon plaintiffs preferred a second appeal to the High Court. The applicant Gowri was not made a party to this appeal.

The High Court held that, if the defendant Vithal did not pay the arrears of rent within three months, the plaintiffs were entitled to recover possession of the lands in dispute.

[50] Vithal failed to make the payment as ordered, and the plaintiffs took possession, in execution of the High Court's decree, of the whole property, including the land in the possession of the applicant Gowri.

Gowri thereupon applied to the Court, under section 332 of the Code of Civil Procedure (Act XIV of 1882), to be restored to possession, on the ground that she was not a party to the High Court's decree, in execution of which she was dispossessed. The Subordinate Judge granted this application.

The plaintiffs appealed to the District Judge, who held that no appeal lay against an order under section 332 of the Code of Civil Procedure, and, therefore, rejected the appeal. Against this decision the plaintiffs appealed to the High Court. The High Court was of opinion that the Subordinate Judge's order restoring the applicant to possession was one under section 244, and not 332, of the Code of Civil Procedure (Act XIV of 1882) and was appealable. The case was, therefore, remanded for a decision on the merits. On remand the District Judge reversed the order of the Subordinate Judge which directed the applicant Gowri to be restored to possession.

Against this order the present application was made to the High Court on the grounds (1) that the applicant, not being a party to the High Court's decree, ought not to have been dispossessed in execution of the said decree, and (2) that the District Judge had no jurisdiction to entertain an appeal against the Subordinate Judge's order.

A rule *nisi* was issued to the opponents to show cause why the District Judge's order, in appeal, should not be set aside, as being illegal and *ultra vires*.

Manekshah Jehanghirshah, for the Plaintiffs (Opponents), showed cause:— The case falls under section 244 of the Code of Civil Procedure (Act XIV of 1882). The applicant was a party to the original suit, and though she was not a party to the appeal in which the final decree was passed, the question whether she was legally dispossessed in execution of the final decree, is one falling under clause (c) of section 244. The proceedings in appeal are but a continuation of the original suit, and the [51] suit does not terminate until the final decree is passed by the highest Court of appeal. The final decree in the present case, therefore, binds

the applicant in common with the other parties to the suit. Refers to *Raghunath Ganesh v. Mulna Amad*, I. L. R., 12 Bom., 449; *Nimba Harishet v. Sitaram Paraji*, I. L. R., 9 Bom., 458; *Rajrup Singh v. Ramgolam Roy*, I. L. R., 16 Cal., 1.

Narayan Ganesh Chandavarkar, for the Applicant, *contra* : —The applicant was not a party to the appeal in which the final decree was passed. She is not, therefore, bound by it. Section 544 of the Code of Civil Procedure does not make one respondent liable under a decree passed against other respondents. No decree can be passed against a party unless he is properly brought before the Court. In section 244, "suit" includes an appeal, and, unless a person is a party to the appeal, he is not bound by the appellate decree, and the case does not fall under section 244. Cites *Gour Kishore v. Mahomed Hassim*, 10 W. R., 191 Civ. Rul.

Telang, J. :—The applicant was one of several defendants in a suit brought by her opponent, who sued for possession of land. On appeal to the District Court, to which she was also a party, that claim was rejected. The plaintiff appealed further to the High Court, which awarded it. But to this second appeal the applicant was not made a party. She was, however, ejected in execution, but, on her complaint thereof, her possession was restored by the Subordinate Judge. Her adversary appealed to the District Judge, who, for reasons into which we need not inquire, reversed the Subordinate Judge's order. She now invokes our jurisdiction, under section 622 of the Code of Civil Procedure (Act XIV of 1882), to set aside the District Judge's order as made without jurisdiction.

It has been argued on her behalf that there was no appeal from the Subordinate Judge's order, section 244 not being applicable under the circumstances, she not having been a party to the appeal in which the decree under execution was passed. We are asked to follow *Cour Kishore v. Mahomed Hassim*, 10 W. R., 191 Civ. Rul., the only reported case, as far as we know, in which the point has been [52] decided. The words to be interpreted are those of section 244, clause (c) : "Any other questions arising between the parties to the suit in which the decree was passed or their representatives." The scope of the section is stated by their Lordships of the Privy Council in *Chowdry Wahed Ali v. Mussamut Jumaar*, 11 Beng. L. R., at p. 155. They say : "This enactment was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation." In the present case we are virtually asked to read the words as if they were "parties to the decree in the suit or in the appeal in which the decree was passed." In the Calcutta case and in *Sankaravadivammal v. Kumarasamy*, I. L. R., 8 Mad., at p. 477, it is, however, pointed out that the words used are "parties to the suit." In the former case it seems that the part of the claim of the plaintiff relating to one of the defendants' lands was rejected by the Court which tried the suit; and when in execution the plaintiff attached these lands it was held that the defendant was not a party to the suit within the meaning of the section, on the ground that he was released from the operation of the decree, and must, as regards the operation of that decree, be considered a stranger to the suit in which he had no further interest or concern.

We are of opinion that, if the Legislature had intended such exceptions to be made, it would have so expressed it, and that we ought to give a literal interpretation to the language of section 244, clause (c). If so, the applicant was a party to the suit, and the District Judge had jurisdiction to hear the appeal.

The construction placed upon section 11 of Act XXIII of 1861, which answers to section 244 of the present Civil Procedure Code, by the High Court of Calcutta in *Gour Kishore v. Mahomed Hassim*, 10 W. R., 191 Civ. Rul., was avowedly not the one pointed to by the words of the enactment. And it appears to us to be not in harmony with the intention of the Legislature, as indicated by the language used. That intention appears to be to dispose, in a single litigation, of all questions in reference to the subject-matter of that litigation arising between the parties once properly brought before the Court. The opinion expressed by the [53] Privy Council in *Chowdry Wahed Ali v. Mussamat Sumaee* as to the proper method of construing a provision of this nature, supports this conclusion. And it also avoids the possible embarrassments which must arise in the event of contradictory orders being made by different Courts with reference to the same subject-matter and between the same parties. Although, therefore, the question is not quite free from doubt, we do not see, on the one hand, enough to justify a departure from the broad language used by the Legislature, and on the other, we do see some reasons, of greater or less weight, to warrant us in giving its full effect to that language.

We may add that this point appears to have been practically disposed of by SARGENT, C.J., and CANDY, J., in this very case at an earlier stage. On looking into the papers referred to in the judgment of the District Judge, it appears that at first the District Judge, upon the appeal being made to him, considered that the order was not one under section 244, but under section 332, and, therefore, held that no appeal lay to him. Against his decree there was a second appeal to the High Court, and on the 17th February 1891, the High Court decided that the order of the Subordinate Judge was one under section 244, and not under section 332, and that, therefore, an appeal did lie to the District Court, which appeal, accordingly, the District Judge was directed to hear under section 244. It is, therefore, out of the question now for us to hold that the District Judge acted without jurisdiction in hearing the appeal so remanded to him for hearing. But, apart from this consideration, the judgment we have referred to shows that SARGENT, C. J., and CANDY, J., took the same view of the construction of section 244 as we have arrived at. And, therefore, as the case falls under section 244, it is not one for the Extraordinary Jurisdiction of the Court, and the rule granted in this case must consequently be discharged with costs.

Rule discharged.

NOTES.

[In the C.P.C., 1908, sec. 47, this Explanation has been added, "For the purpose of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit." This sets at rest the previous conflict of case-law between (1893) 17 Bom., 49; (1900) 23 Mad., 361; (1896) 31 Bom., 33; (1904) 6 Bom. L. R., 697; (1902) 15 C. P. L. R., 106 and (1902) 29 Cal., 696; (1903) 30 Cal., 134; (1901) 23 All., 346.]

[54] APPELLATE CIVIL.

The 21st March, 1892.

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG,

Ram Tukoji.....(Original Plaintiff) Appellant

versus

Gopal Dhondi.....(Original Defendant) Respondent.*

Landlord and tenant—Tenant's liability to pay cess imposed by an Act subsequent to the lease—Bombay Act III of 1869, Sec. 8—Local-fund cess.

Under section 8 of Bombay Act III of 1869 a lessor, who is in the position of a superior holder, may recover the local-fund cess from his lessee.

Ranga v. Suba Hegde, I. L. R., 4 Bom., 473, followed.

SECOND APPEAL from the decision of R. S. Tipnis, Acting District Judge of Ratnagiri, in Appeal No. 154 of 1889 of the District File.

The plaintiff sued to recover Rs. 80, being the amount of rent and local-fund cess due for the years 1883-84 to 1886-87 in respect of certain lands in defendant's occupation.

The defendant held, at a fixed rent of Rs. 10 per annum, under a permanent lease granted by the plaintiff's father in 1862.

The defence to the suit was that the plaintiff had no right to enhance the rent, or recover the local-fund cess, in respect of the lands in defendant's possession.

Both the lower Courts held that the claim to enhanced rent was *res judicata*, having been decided against the plaintiff in a former litigation between the parties.

As to the local-fund cess, the Subordinate Judge awarded the claim, but the Appellate Court rejected it, on the ground that the cess was *prima facie* payable by the lessor, and that there was no agreement by the lessee to pay it.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ghanasham Nilkanth, for Appellant:—Under section 8 of Bombay Act III of 1869 a superior holder can recover the local-fund cess from an inferior holder. A landlord is in the position of a superior holder. He is, therefore, entitled to recover the cess from his tenants.—*Ranga v. Suba Hegde*, I. L. R., 4 Bom., 473.

* [55] *Daji Abaji Khare*, for Respondent:—The defendant held under a lease granted by plaintiff's father in 1862 long before the cess was imposed. The lessor cannot recover anything in excess of the rent fixed in the lease. It would be varying the terms of the written contract between the parties if the lessee were held liable to pay the cess in addition to the fixed rent.—*Babshetti v. Venkataramana*, I. L. R., 3 Bom., 154. Section 83 of Bombay Act V of 1879 prevents a lessor from enhancing the rent in the face of an express agreement.

Jardine, J.:—We do not differ from the opinion of the lower Court of Appeal on the question of *res judicata*.

Objection has been taken to the ruling of that Court, that the defendants, who obtained a permanent lease of the land in 1862, are not liable to pay the

* Second Appeal, No. 877 of 1890.

local-fund cess, since imposed by Bombay Act III of 1869. The District Judge's reasons are that no agreement to pay the cess had been proved, and that it is *prima facie* payable by the land-owner. The pleader for the appellant argues that the Act imposes the tax on the lessee, as ruled in a reported case from North Kanara, *Ranga v. Suba Hegde*, I. L. R., 4 Bom., 473, where it is said: "The cess is distinct from rent, and not having been in existence at the time the lease was made, it is of course not provided for in that lease. In the absence of any contract to the contrary, we think that it is equitable, and in accordance with the intention of the Legislature as shown in section 8 of Bombay Act III of 1869, that the cess should be ultimately paid by the tenant." The pleader has not been able to refer us to any authority in support of the argument derived from equity.

No reference has been made to the Land Revenue Code, Bombay Act V of 1879; but the argument advanced for the appellant amounts to this—that we should interpret section 8 of Act III of 1869 as if it meant what is very plainly said in section 50 of the Act of 1879. Cf. Regulation XVII of 1827, section 6, clause 2, now repealed. This argument concedes that the Bombay Legislature has imposed the tax on the superior holder, in the present case the lessors; and the only question is whether section 8 of the Act of 1869 implies that the superior holder may recover the amount from the lessee. That the lessor was a superior holder within the [56] definition of the Bombay Survey Act I of 1865, section 2, clause k, the law in force in 1869, may be conceded. As to "occupants" being regarded as superior holders for the purpose of the assistance provided by Regulation XVII of 1827, Chaps. 6 and 7, see section 44 of the Survey Act.

The difficulty of construing section 8 of Bombay Act III of 1869, as imposing a duty on the inferior holder or lessee to pay the cess, arises from the want of explicit statement such as may be expected in a law imposing a new tax, especially when this section is compared with section 50 of Bombay Act V of 1879. On the other hand, section 8 of the Act of 1869 makes the provisions of the law relative to assistance applicable to *all* superior holders. The question is one of general importance, and we have taken time to consider it. On the whole, we think section 8 is open to the construction put upon it, in *Ranga v. Suba Hegde*, I. L. R., 4 Bom., 473, by WESTROPP, C. J., and MELVILL, J., and though that interpretation is not perhaps the necessary meaning of the words, we think we ought to lean to it, in order to avoid the unsettling of titles which might arise if we departed from what those eminent Judges have laid down. We now reverse the decree of the District Court and restore that of the Subordinate Judge. Costs of both appeals on the present respondent, the first defendant.

Decree reversed.

NOTES.

[See also (1892) 17 Bom., 422 (*inamdar*); (1902) 26 Bom., 504 (no right in superior holders *ipso facto* to recover).]

[17 Bom. 56]

APPELLATE CIVIL.

The 11th April, 1892.

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Sardarsingji(Original Plaintiff) Appellant
versus

Ganpatsingji and another.....(Original Defendants) Respondents.*

*Court Fees Act (VII of 1870), Sec 7, Cl. 4, Sub-clauses (c) and (d)—
Valuation of suit—Valuation of a suit for injunction—Injunction—
Appeal—Order rejecting plaint as insufficiently stamped.*

A suit for a declaration of right and for an injunction falls under section 7, clause 4, sub-clauses (c) and (d) of the Court Fees Act VII of 1870. The valuation of the relief sought in such a suit rests with the plaintiff, and not with the Court.

[57] A sued B and C (1) for a declaration of his title to certain property, and (2) for an injunction restraining C from paying, and B from receiving, an allowance of Rs. 2,400 a year out of the income of the property in dispute. A valued each of the reliefs sought at Rs. 130, and affixed a Court-fee stamp of Rs. 20 to the plaint.

The Court of First Instance rejected the plaint as insufficiently stamped, holding that the claim for the injunction sought should have been valued at ten times the annual allowance paid by C to B, as provided by section 7, clause 2 of Act VII of 1870.

On appeal to the High Court,

Held, that the suit fell under section 7, clause 4, sub-clauses (c) and (d) of the Court Fees Act, and the plaintiff had a right to put his own valuation on the relief sought.

Held, also, that the order rejecting the plaint as insufficiently stamped was appealable.

APPEAL from the decision of E. H. Moscardi, Acting Assistant Judge of Surat at Broach, in Suit No. 1 of 1887.

This was a suit originally brought for a mere declaration that the plaintiff was the sole heir and successor of his father to the Sarod wania estate. The plaintiff alleged that the defendant No. 1 was a spurious child set up by his step-mother to defeat the plaintiff's right of inheritance: that the estate was in the management of the Talukdari Settlement Officer, defendant No. 2, under Bombay Act XXI of 1881; and that out of the revenues collected by that officer, the defendant No. 1 was illegally paid Rs. 200 per mensem on account of his maintenance.

The plaint was filed on a ten-rupee stamp.

The suit was dismissed by the Court of First Instance under section 42 of the Specific Relief Act (1 of 1877).

On appeal, the High Court also held that the suit for a mere declaration of title would not lie, but allowed the plaintiff to amend the plaint by adding a prayer for consequential relief, and remanded the case to the lower Court, to enable the plaintiff to make the necessary amendment (see I. L. R., 14 Bom., 395).

On remand, the plaintiff amended the plaint by inserting an additional prayer for an injunction, restraining the defendant No. 2 from paying, and defendant No. 1 from receiving, Rs 200 a month out of the income of the property in dispute.

* Appeal, No. 134 of 1890.

[58] The plaintiff valued the claim for injunction at Rs. 130, and paid a Court-fee of Rs. 10.

Thereupon the Court raised the following issue:—

"Is the amended plaint properly stamped?"

The Court held that the plaint was not properly valued, and that it should have been valued at Rs. 24,000.

The reasons for this finding were stated as follows:—

"The object of the amended suit is to put a stop to the allowance paid by defendant No. 2, the Talukdari Settlement Officer, to defendant No. 1, whose estate he is administering under the Talukdari Settlement Act, on the ground that the plaintiff, and not defendant No. 1, is the rightful heir to the estate. In other words, plaintiff claims the money which defendant No. 2 pays defendant No. 1 as allowance, on the ground that he, and not defendant No. 1, is rightfully entitled to it. I am, therefore, of opinion, that plaintiff's claim should be valued in accordance with Act VII of 1870, section 7, clause 2, at ten times the amount of the yearly allowance paid by defendant No. 2 to defendant No. 1. This allowance being Rs. 200 per month, or Rs. 2,400 per year, I think the proper valuation of the relief sought is Rs. 24,000."

For these reasons the Court directed the plaintiff to correct the valuation of his plaint to Rs. 24,000 within a period of two months.

The plaintiff refused to pay any additional Court-fee, and the plaint was rejected.

Against this order of rejection the plaintiff appealed to the High Court.

Ganpat Sadashiv Rao for Appellant:—This is a suit for a declaratory decree, and an injunction. In such a case, the plaintiff is at liberty to put his own valuation on the reliefs sought. The case falls under section 7, clause 4, sub-sections (c) and (d) of the Court Fees Act VII of 1870. This is not a suit for an annuity or other periodical payment. The plaintiff does not claim any sum of money in this suit. Clause 2 of section 7, therefore, [59] does not apply. Refers to *Raghunath Ganesk v. Gangadhar Bhikaji*, I. L. R., 10 Bom., 60.

Rao Sahel Vasudev Jagannath Kirtikar for Respondents:—The claim for the injunction sought is not properly valued. The valuation should be the same as if the suit was for actual money, and the amount can be calculated under clause 2 of section 7 of the Court Fees Act. This is not an ordinary case of an injunction where the relief sought is not capable of valuation even approximately. Refers to *Omrao Mirza v. Jones*, I. L. R., 10 Cal., 599.

Jardine, J.:—This case, which has been before the High Court at an earlier stage, see I. L. R., 14 Bom., 395, is one in which the Court has jurisdiction to hear an appeal from an order rejecting the plaint on a question of valuation. See the Full Bench decision in *Vithal Krishna v. Balkrishna Janardan*, I. L. R., 10 Bom., 610.

• The plaintiff sues for a declaration of right and for an injunction to prevent the first defendant from receiving from the second defendant, the Talukdari Settlement Officer, the amount of an annual allowance. Such a suit comes, in our opinion, within the words of section 7, clause 4, sub-clauses (c) and (d) of the Court Fees Act VII of 1870, and the amount of fee payable is to be computed under that section "according to the amount at which the relief sought is valued in the plaint," and this amount the plaintiff is required to state. It may be that the result of the suit, if successful, will eventually be tantamount to the relief which might be awarded in a suit of the kind described in clause 2, which states the mode of computing the fee "in suits for

maintenance and annuities or other sums payable periodically;" and the Assistant Judge has rejected the plaint on the ground that the valuation should be computed according to this clause. A fiscal Act, ought, however, to be interpreted precisely; and no authority has been shown us for holding that clause 2 applies. The case of *Boidya Nath Adya v. Makhan Lal Adya*, I. L. R., 17 Cal., 680, to which we referred at the hearing, deals with the valuation of a partition suit and is not in point. The decisions in [60] *Ostoché v. Hari Das*, I. L. R., 2 All., 869, and *Jogal Kishor v. Tale Singh*, I. L. R., 4 All., 320, are upon the section and clause which we have to interpret. In them it was held that the valuation of the relief sought rests with the plaintiff and not with the Court. The reasons which appear to account for the Legislature leaving it to the plaintiff to name the valuation of suits of the nature described in clause 4 of section 7 are given by WESTROPP, C. J., in *Manohar Ganesh v. Bawa Ramcharandas*, I. L. R., 2 Bom., 219, at pp. 226, 227. Being of opinion that the Assistant Judge was bound to treat the suit as coming under clause 4, sub-clauses (c) and (d), we reverse his order and remand the case for trial on the merits. Costs to be dealt with when the new decree is passed, except the costs of this appeal which we order the defendant No. 2 to pay.

Telang, J. :—I concur. The plaintiff in this case prays, in terms, only for a declaration and an injunction; and the case, therefore, *prima facie*, must be dealt with under section 7, clause 4, sub-clauses (c) and (d) of the Court Fees Act. The Judge in the Court below, however, applied section 7, clause 2, to the case, because, as he says, "the plaintiff claims the money which the defendant No. 2 pays to defendant No. 1 as allowance on the ground that he, and not defendant No. 1, is rightfully entitled to it." But this view is plainly not correct, for the plaintiff does not, in fact, "claim the money" in the ordinary meaning of that expression, and cannot possibly get a decree for it in this suit. Indeed, in the judgment of JARDINE, J., in this case on the previous remand, it was expressly decided (CANDY, J., apparently not dissenting from that view) that "the plaintiff cannot sue for the possession of the estate, as it is under management in pursuance of an order under the special Statute." And *Ganpatgir v. Ganpatgir*, I. L. R., 3 Bom., 230, and *Chokalingapeshana v. Achtyar*, I. L. R., 1 Mad., 40, were on that ground, distinguished. If, then, possession cannot be claimed of the whole estate, or of the portion of it referred to by the Court below, it cannot be fair, even apart from the actual language of the Court Fees Act, to levy a Court-fee from the plaintiff as if the suit was for possession. Yet this [61] is the result of the order of the Court below. Mr. Vasudev sought to support that order on the ground that this is not like an ordinary case for an injunction, where the relief sought cannot be valued. But I do not think that the words of the Act warrant any such distinction as Mr. Vasudev seeks to draw. And, in any event, I cannot perceive why, in construing a fiscal enactment, we are to take a distinction, by which, without clear authority in the language used by the Legislature, a suit in which a plaintiff does not pray for money or property to be paid or delivered to him is to be treated on exactly the same footing as a suit in which he does pray for such relief.

If, then, clause 4, sub-clauses (c) and (d), apply to the case, the question arises whether the words "the amount at which the relief sought is valued in the plaint" allow the plaintiff to put forward an arbitrary valuation. *Prima facie*, they certainly do seem to leave such a liberty to a plaintiff, and some reasonable grounds for such liberty being allowed are suggested by WESTROPP, C. J., in *Manohar Ganesh v. Bawa Ramcharandas*, I. L. R., 2 Bom., 219. But, without going into the general question on the present occasion, I think the

case before us is one in which the valuation did not form part of the functions of the Court, but could be made by the plaintiff as he pleased. And the Judge's order, therefore, to amend the valuation, and his subsequent dismissal of the suit for refusal to amend, were both erroneous. The decree of the Court below must, therefore, be reversed and the suit remanded for trial on the merits. The defendant ought, I think, to pay the appellant his costs of his appeal. All other costs to be dealt with by the Court below in making its decree on the new trial.

Order reversed.

NOTES.

[This was approved in (1905) 32 Cal., 734; see also (1894) 19 Bom., 198; (1898) 23 Bom., 486; (1909) 34 Bom., 267; 6 C.L.J., 427; (1913) 19 I.C., 859 (Punjab); (1902) P.R., 63, overruled in (1913) 22 I.C., 503 F.B.; (1912) 13 I.C., 408 (Punjab).]

[62] ORIGINAL CIVIL.

The 15th September and 3rd October, 1892.

PRESENT.

MR. JUSTICE FARRAN.

Lilladhar Jairam Narranji and others.....Plaintiffs

versus

George Wreford and others.....Defendants.* -

Sale of goods—Appropriation to vendee—Passing of property to vendee—Bankruptcy of agents for purchase—Unpaid vendor—Stoppage in transit -

Termination of transit—Goods landed in Dock and held by Dock

authorities—Bombay Act VI of 1879, Secs 43 and 62 - Port

Trustees of Bombay—Bye-laws of Port Trust Rule 59.

In August 1890, the plaintiffs, through Benn, Ashley and Co., of Bombay, ordered from Bevis, Russell and Co., in London, 100 bales of grey shirtings at 7s. 10d. per piece f. o. b., November-December shipment. In order to carry out this order, Bevis, Russell and Co. purchased goods of the required description from Messrs. Dewhurst and Co., of Manchester. The heading of the invoice of the goods supplied by Dewhurst and Co. contained these words: "Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the protection of their acceptances of Geo. and R. Dewhurst's draft against this or any of these shipments," and the letter addressed by Dewhurst and Co. to Bevis, Russell and Co. forwarding draft contained the following clause:—"It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm." To this letter Bevis, Russell and Co. replied: "We confirm the arrangements between us as to the disposal of remittances and against the shipments." The bales were duly marked with the plaintiffs' mark by direction of Bevis, Russell and Co., and were to be delivered f. o. b. at Liverpool. Dewhurst and Co. accordingly despatched the 100 bales to Liverpool, and there Bevis, Russell and Co. had them shipped in eight different vessels, viz., 13 bales in each of the four steamers "Nubia," "Clan Drummond," "Inchulva" and "Roumania," and 12 bales in each of the ships "Hispania," "Eden Hall," "City of Edinburgh" and "Wistow Hall." The 100 bales were consigned to Bombay by Bevis, Russell and Co. in their own name, the bills of lading being made out to their order or to his or their assigns." Bevis, Russell and

Suit, No. 679 of 1890.

Co. paid the freight at Liverpool and effected insurance on the plaintiffs' behalf. All the shipments were made before the 1st December 1890, except the 12 bales by the "Wistow Hall," which were shipped on that day. On the several shipments being effected, Bevis, Russell and Co. accepted bills of Dewhurst and Co. payable three months after date. The bills of lading of the bales shipped in the "Nubia," "Clan Drummond" and "Hispania" were endorsed, in blank, by Bevis, Russell and Co. and sent by post to Benn, Ashley and Co., of Bombay. The "Nubia" arrived at Bombay in November, and the plaintiffs received the 13 bales shipped by her, Benn, Ashley and Co. having endorsed the bill of lading to the plaintiffs. No specific payment was made by the plaintiffs in respect of these bales, but at that time they had a sum standing to their credit in the books of Benn, Ashley and Co. The invoices of 25 more bales, viz., 13 bales ex "Clan Drummond" and 12 bales ex "Hispania," arrived in Bombay later in November, and were handed to the plaintiffs. On [63] the 1st December 1890, the plaintiffs paid Rs. 25,000 to Benn, Ashley and Co. Neither the "Clan Drummond" nor the "Hispania" had then arrived in Bombay.

On the 4th December 1890, Bevis, Russell and Co. suspended payment, and on that day a receiving order was made vesting their assets in the first defendant, Wreford; and on the next day Pixley was appointed special manager of the estate under section 12 of the English Bankruptcy Act (Stat. 46 and 47 Vic., c. 52). At that time the bills of lading for the remaining 62 bales were still with Bevis, Russell and Co., who then handed them over to Pixley. On the same 5th December 1890, Benn, Ashley and Co. suspended payment in Bombay. On the 15th December 1890, Dewhurst and Co. telegraphed to their agents in Bombay, Messrs. Ritchie, Stuart and Co., directing them to stop the goods in transit, including the 25 bales ex "Clan Drummond" and "Hispania." On the 15th December, Ritchie, Stuart and Co. on behalf of Dewhurst and Co. gave notice to the agents of the "Hispania" to stop the 12 bales on board that vessel. Previously to that notice, however, the bales had been landed in the Dock at Bombay. They then gave the Dock authorities notices, but at that time the ships' agents had already given the plaintiffs a delivery order for the goods. On the same day, viz., the 15th December, Ritchie, Stuart and Co. gave notice to the agents of the "Clan Drummond" to stop the 13 bales on board. These bales had not then been landed, and were then still on board.

The other five steamers with the remaining 62 bales duly arrived in Bombay and went into Dock. On the 22nd January 1891, the "Roumania," the "City of Edinburgh," and the "Wistow Hall" had landed all the bales which they had on board. The "Eden Hall" had landed 9 out of the 12 which she had brought, leaving 3 still to be discharged, and the "Inchulva" had not landed any of her bales, the whole 13 being still on board. On that day (2nd January 1891) Ritchie, Stuart and Co. on behalf of Dewhurst and Co. wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of "Wistow Hall," in respect of which no notice was sent. These notices were all delivered on the 3rd January 1891.

Held—

(1) On the evidence, that the payment of the Rs. 25,000, by the plaintiffs, to Benn, Ashley and Co. in Bombay was a payment for and on account of the 100 bales. In respect of transactions before bankruptcy, a payment to Benn, Ashley and Co. was a payment to Bevis, Russell and Co.; but, if that were not so, Benn, Ashley and Co. were agents to receive payment.

(2) That on the goods being shipped at Liverpool, if not at an earlier date, the property in them passed from Dewhurst and Co. to Bevis, Russell and Co., and from the latter, by reason of the plaintiffs' contract with Bevis, Russell and Co., to the plaintiffs,—Bevis, Russell and Co. having, by holding the bills of lading, the constructive possession of the goods, and the legal right to their actual possession, and to retain the same until their price was paid by the plaintiffs with the charges.

(3) That the plaintiffs were entitled, as against the representatives of Bevis, Russell and Co. and Benn, Ashley and Co. in bankruptcy, to the bills of lading and the goods represented by them without further payment. Ritchie, Stuart and Co. as agents of the

Official Receiver had not, therefore, the right to withhold the bills of lading of any of these bales from the plaintiffs.

[64] (1) On the evidence, that when Dewhurst and Co. forwarded the goods to Bevis, Russell and Co. at Liverpool they really started the goods on their voyage to Bombay, and that the transit lasted until the bales were "at home" in Bombay. Until then the right of Dewhurst and Co. to stop the goods in transit lasted.

(5) That effectual notice on behalf of Dewhurst and Co. to stop in transit was given in respect of the 13 bales *ex* "Roumania" by the notice sent by Ritchie, Stuart and Co. on the 15th December 1890. The general notice given on that day to the agents of the "Roumania" not only as to specific bales, but as to any other bales shipped on account of Geo. and R. Dewhurst to Messrs. Benn, Ashley and Co., although indefinite, covered the shipment by the "Roumania," and was given in time to prevent the bales on board that ship from reaching "home."

(6) That effectual notice by Ritchie, Stuart and Co. on behalf of Dewhurst and Co. to stop in transit was given in respect of the 13 bales *ex* "Inchulva" and 3 bales (out of the 12) *ex* "Eden Hall" which were still in board and undischarged at the date of the notice of the 2nd January 1891.

(7) As to the 12 bales *ex* "Hispania" landed prior to the notice of the 15th December and as to the 12 bales *ex* "City of Edinburgh" and the 9 (out of the 12) *ex* "Eden Hall," landed before the notice of the 2nd January 1891, and as to the 12 *ex* "Wistow Hall" in respect of which no notice at all was given, that the plaintiffs were entitled to them.

(8) That the goods ceased to be in transit when landed in Dock in Bombay

BENN, Ashley and Russell carried on business in Bombay as merchants under the style of Benn, Ashley and Co., and in London and Manchester under the style of Bevis, Russell and Co. W. Macdonald was the manager of Benn, Ashley and Co. in Bombay, but was not a partner.

The plaintiffs were merchants carrying on business in Bombay under the name of Jairam Narranji and Sons. They dealt in piece-goods, which they used to order out from England, from Bevis, Russell and Co. through the Bombay firm of Benn, Ashley and Co.

In August 1890, the plaintiffs ordered from Bevis, Russell and Co., in London, through Benn, Ashley and Co., of Bombay, 100 bales of grey shirtings at 7s. 10d. per piece f. o. b., November-December shipment. In order to be in a position to execute this order, Bevis, Russell and Co. purchased goods of the required description from Dewhurst and Co., of Manchester.

The heading of the invoice of the goods supplied by Dewhurst and Co. contained these words: "Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the pro-[65]tection of their acceptances of Geo. and R. Dewhurst's drafts against this or any of these shipments," and the letter addressed by Dewhurst and Co. to Bevis, Russell and Co. forwarding draft contained the following clause:—"It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill or any other of your acceptances of our drafts against such shipments, which please confirm," and to this letter Bevis, Russell and Co. replied as follows:—"We confirm the arrangements between us as to the disposal of remittances and against the shipments."

On the 1st September 1890, Bevis, Russell and Co. directed the 100 bales to be marked with the plaintiffs' mark. The goods were to be delivered f. o. b. at Liverpool. Dewhurst and Co. accordingly despatched the 100 bales bearing the plaintiffs' mark to Liverpool in different lots. At Liverpool, Bevis, Russell and Co. had them shipped in eight different vessels, *viz.* 13 bales in each of the four ships "Nubia," "Clan Drummond," "Inchulva" and "Roumania" and 12 bales in each of the ships "Hispania," "Eden Hall,"

"City of Edinburgh" and "Wistow Hall." The 100 bales were consigned to Bombay by Bevis, Russell and Co. in their own names, the bills of lading being made out to their own "order or to his or their assigns." The freight was paid by Bevis, Russell and Co. in Liverpool on the plaintiffs' behalf, and they also effected insurance for the plaintiffs. All the shipments were made before the 1st of December 1890, except the 12 bales by the "Wistow Hall," which were shipped on that day. On the several lots being shipped, Bevis, Russell and Co. accepted bills of Dewhurst and Co. payable three months after date.

The bills of lading for the bales *ex* "Nubia," "Clan Drummond" and "Hispania" were endorsed, in blank, by Bevis, Russell and Co. and sent by post to Benn, Ashley and Co., of Bombay. The "Nubia" arrived in Bombay in November, and the plaintiffs received the 13 bales shipped by her, — Messrs. Benn, Ashley and Co. having endorsed the bill of lading to the plaintiffs. The plaintiffs received these bales without making any specific payment in respect of them, but at that time they had a sum standing to their credit in the books of Benn, Ashley and Co. The [66] invoices of 25 more bales, *viz.*, 13 *ex* "Clan Drummond" and 12 *ex* "Hispania" arrived in Bombay later in November, and were handed to the plaintiffs. On the 1st December 1890, the plaintiffs paid Rs. 25,000 to Benn, Ashley and Co. Neither the "Clan Drummond" nor the "Hispania" had then arrived in Bombay.

On the 4th December 1890, Bevis, Russell and Co. suspended payment, and on the same day a receiving order was made vesting their assets in the first defendant, Wreford. On the next day F. W. Pixley was appointed special manager of the estate under section 12 of the English Bankruptcy Act, 1883. At that time the bills of lading for the remaining 62 bales were still with Bevis, Russell and Co. in England, who then handed them over to Pixley. On the same day (5th December 1890) Benn, Ashley and Co. suspended payment in Bombay.

On the 6th December 1890, the vendors, Dewhurst and Co., gave notice to the receiver, Wreford, that they claimed all shipping documents, goods and proceeds of goods and remittances to Benn, Ashley and Co., Bombay, for which Dewhurst and Co. had drawn bills, and requiring him to apply the same proceeds and remittances towards payments of such bills in accordance with the invoice headings. On the 10th December 1890, Dewhurst and Co. sent a telegram to their agents in Bombay, Messrs. Ritchie, Stuart and Co., stating that they claimed "to have the goods sold by them and proceeds specifically applied to pay bills against goods." This was notified to Benn, Ashley and Co.

On the 11th December it was arranged between the Official Receiver and Dewhurst and Co. that the goods of the latter which had been sent out to native constituents in India should be sold by Messrs. Ritchie, Stuart and Co., of Bombay, who should hold the proceeds of such goods to the joint account of the receiver and Dewhurst and Co. On this arrangement being made, a joint telegram was sent to Ritchie, Stuart and Co. on the 12th December 1890, in the following terms:—"Please carry out sales to natives delivering goods against cash only and remit proceeds to England in joint names of Pixley and Dewhurst." In pursuance of this arrangement, Pixley sent the bills of lading for the 62 bales to Ritchie, Stuart and Co. in Bombay.

[67] On the 13th December 1890, Dewhurst and Co. having heard that the Official Assignee in Bombay claimed all goods consigned to Benn, Ashley and Co. sent a telegram to Ritchie, Stuart and Co. directing them to stop the goods in transit, including the 25 bales *ex* "Clan Drummond" and "Hispania." On the morning of the 15th December, Ritchie, Stuart and Co. on behalf of

Dewhurst and Co. gave notice to Graham and Co., the agents for the "Hispania," to stop the 12 bales on board that vessel. Previously to that notice, however, the goods had been landed in the Dock at Bombay. They then gave the Dock authorities notice to stop them, but at that time Graham and Co. had already given the plaintiffs a delivery order for the goods. On the same morning, viz., the 15th December, Ritchie, Stuart and Co. gave notice to the agents of the "Clan Drummond" to stop the 13 bales on board that vessel. These bales had not then been landed, and were then still on board.

The remaining 62 bales duly arrived in Bombay. As already mentioned, Pixley had sent the bills of lading to Ritchie, Stuart and Co. By the arrangement of the 11th December between Dewhurst and Co. and the receiver it had been arranged that Ritchie, Stuart and Co. should sell these (with others) goods and hold the proceeds. On the 31st December, Ritchie, Stuart and Co. on behalf of the Official Receiver and of Pixley sent notices to the agents of the five different vessels in which the 62 bales were shipped, to hold the goods for them, stating that they held the bills of lading. At that time four of the vessels were in the Dock. On the 2nd January 1891, out of the 62 bales which had arrived, 46 had been discharged and were in the hands of the Dock authorities, and 16 were still on board. On that day the 62 bales were found to be as shown in the following table:—

Vessel.	Number of bales discharged.	Number of bales undischarged.
"Eden Hall"	9	3
"Inchulva"	0	13
"Roumama"	13	0
"City of Edinburgh" ...	12	0
"Wistow Hall"	12	0
Total discharged ...	46	Undischarged ... 16

[68] On the said 2nd January 1891, Ritchie, Stuart and Co. on behalf of Dewhurst and Co. wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of the "Wistow Hall," in respect of which no notice was given. These notices were all delivered on the 3rd January 1891.

The suit was filed on the 8th December 1890. The plaintiff set forth (*inter alia*) that, prior to the failure of Bevis, Russell and Co. and Benn, Ashley and Co., the 100 bales had been shipped to Bombay on account and at the risk of the plaintiffs by Bevis, Russell and Co.; that 13 bales *ex* "Nubia" had been duly received by the plaintiffs; that a further lot of 25 bales (*viz.*, 13 bales *ex* "Clan Drummond" and 12 bales *ex* "Hispania") had arrived, and of these the plaintiffs, as receivers, had got possession of 13, but that the agents of the S.S. "Hispania," in which the 12 bales had arrived, refused to deliver these latter to the plaintiffs; that subsequently 62 bales, (the remainder of the 100 bales), arrived in Bombay, and were taken possession of by the defendants, Messrs. Ritchie, Stuart and Co., acting, as they alleged, under the instructions of the first defendant, Wre福德, the Official Receiver, in England, of the estate of Bevis, Russell and Co., and also on behalf of Messrs. Dewhurst and Co., of Manchester, the alleged vendors of the said 100 bales. Messrs. Ritchie, Stuart and Co. refused to deliver up the said bales to the plaintiffs except upon the terms of the plaintiffs paying the full invoice price thereof and the charges thereon.

The plaintiff prayed (*inter alia*) that the plaintiffs might be declared entitled to the two lots of 25 bales and 62 bales, and that the defendants,

Messrs. Ritchie, Steuart and Co., might be ordered to deliver up the said 62 bales, and to pay Rs. 1,000, as damages for the illegal detention thereof.

The defendants, Messrs. Ritchie, Steuart and Co., filed a written statement. They set forth that, in respect of the matters complained of, they had acted as the agents for the defendant Wreford, the Official Receiver, in England, of Bevis, Russell and Co., and also as the agents of one, F. W. Pixley, of London, who had been, on the application of the creditors, appointed by the said Official Receiver to be special manager of the estate [69] of the said insolvent firm under section 12 of the English Bankruptcy Act (Stat. 46 and 47 Vic., c. 52) and also as the agents of Messrs. Geo. and R. Dewhurst, the vendors of the said goods. They submitted that the right of Wreford, of Pixley, and of Messrs. Geo. and R. Dewhurst, or of some of them, to the said 87 bales was superior to the right (if any) of the plaintiffs.

They further stated that for many years Messrs. Geo. and R. Dewhurst had dealt with Messrs. Bevis, Russell and Co. as follows. The latter firm on obtaining indents from natives in Bombay used to contract to purchase goods from Geo. and R. Dewhurst, who sold the same on the express condition that they should be consigned to Benn, Ashley and Co., of Bombay, and that the proceeds of such goods should be specifically held for the protection of all the acceptances by Bevis, Russell and Co. of the drafts of Geo. and R. Dewhurst drawn against every shipment of goods sold by Geo. and R. Dewhurst to Bevis, Russell and Co.

The bills drawn by the said Geo. and R. Dewhurst against the said 87 bales, and accepted by Bevis, Russell and Co., had been dishonoured, and there were outstanding dishonoured acceptances of Bevis, Russell and Co. on the drafts of Geo. and R. Dewhurst drawn in the course of business aforesaid to the amount of about £22,676-14-6.

The defendants submitted that, (having regard to the course of dealing between Geo. and R. Dewhurst and Bevis, Russell and Co.), all goods sold by them as aforesaid were held by Bevis, Russell and Co., or by Benn, Ashley and Co., as trustees for the said Geo. and R. Dewhurst, and that the said goods, and the proceeds of such goods, formed no part of the estate of Bevis, Russell and Co., or Benn, Ashley and Co., but were specifically set apart and ear-marked as appropriated for the protection, not only of the drafts drawn on any particular shipment, but of all outstanding acceptances of Bevis, Russell and Co. on the drafts of Geo. and R. Dewhurst. They contended that, in the events that had happened, the said Geo. and R. Dewhurst were entitled to a lien and charge on the said 87 bales of goods, or that the said 87 bales were impressed with a trust in favour of Geo. and R. Dewhurst for the amount of all outstanding acceptances [70], or, at any rate, for the amount of the drafts drawn against the said 87 bales and dishonoured by Bevis, Russell and Co.; or that otherwise Geo. and R. Dewhurst had a claim to the 87 bales paramount to the plaintiffs.

The written statement further alleged that Geo. and R. Dewhurst, as unpaid vendors, had stopped the said goods in transit, and were entitled to do so.

The defendants annexed to this written statement copies of the form of invoice and of the letter forwarding draft drawn against shipments for acceptance used by Geo. and R. Dewhurst in their dealings with Bevis, Russell and Co., and of the letter in reply from Bevis, Russell and Co. The written statement alleged that "the said forms were always used, and the drafts, with reference to the goods in the plaint mentioned, are in the same form." The following was the heading of the invoice:—

"Invoice of 5 bales goods marked, &c., shipped per S. S. ——— to Bombay consigned to Messrs. Benn, Ashley and Co. there on account of the concerned. Proceeds to be

remitted to Messrs. Bevis, Russell and Co., London, specifically for the protection of their acceptance of Geo. and R. Dewhurst drafts against this or any of these shipments."

The following was the form of the letter addressed to Messrs. Bevis, Russell and Co. forwarding draft:—

"MESSRS. BEVIS, RUSSELL AND CO.,

"London.

"DEAR SIRS,—We beg to hand, for favour of your acceptance and return to our London office, our draft @ 3 m/d for £———against shipment as per above statement.

"It is understood that the proceeds of the goods are to be remitted to and held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm."

"Yours faithfully.

"(Signed) G. AND R. DEWHURST."

The following was the form of Bevis, Russell and Co.'s letter of reply:—

"MESSRS. GEO. AND R. DEWHURST,

"Manchester.

"DEAR SIRS,—We are in receipt of your favours of yesterday enclosing your draft upon us for £———due 13th October, which we have handed to your firm here [71] duly accepted, and we confirm the arrangements between us as to the disposal of remittances and against the shipments.

"Yours faithfully,

"(Signed) BEVIS, RUSSELL AND CO."

On the 24th February 1891, by consent of the parties an order was made that the plaintiffs should obtain possession of all the bales not already received by them upon their undertaking, (in the event of the defendants, or any of them, being held entitled to the bales, or any of them, or to a lien, charge or trust on them, or any of them, as against the plaintiffs), to pay to the defendants so held entitled the invoice value of the bales or the amount of such lien, charge, &c., &c.

Lang (Acting Advocate-General) and *Anderson* for the Plaintiffs.

Inverarity and *Jardine* for the Defendants Messrs. Ritchie, Stewart and Co

Scott for the Official Receiver Wrexford, (defendant No. 1).

Lang (Acting Advocate-General) and *Anderson* for Plaintiffs:—The plaintiffs are entitled to the goods. Dewhurst and Co. have no title. Apart from the question of stoppage in transit, the goods had become the property of the plaintiffs. The plaintiffs had paid Rs 25,000 as the price of these, and the bales had been duly appropriated to them. The freight and insurance had also been paid on their behalf. It cannot be said that on the bankruptcy of Bevis, Russell and Co. the bales were in their reputed ownership under section 44 of the English Bankruptcy Act, 1883. Stat. 46 and 47 Vic., c. 52. That doctrine does not apply in a case like this. See *Lindley on Partnership* (5th Ed.), p. 682. Here, however, the goods were not in possession of the bankrupt. They only had the bills of lading, and they held these in trust for the owners of the goods, who became entitled to them on payment of the prices—*Lindley on Partnership* (5th Ed.), p. 683. As to stoppage in transit, we contend that the transit, during which Dewhurst and Co. could exercise the right to stop, was only to Liverpool, not to Bombay—Indian Contract Act (IX of 1872), section 99; *Ex parte Miles*, 15 Q.B.D., 39; *Ex parte Watson*, 5 Ch. D., 35; [72] *Bethell v. Clark*, 20 Q. B. D., 615; *Lyon v. Hoffnung*, 15 Ap. Ca., 391; *Berndtson v. Strang*, 37 L. J. (Ch.), 665. If so, there was clearly no stoppage. Nor was there a good stoppage even assuming that the transit lasted to Bombay—*Benjamin on Sales* (4th Ed.), pp. 871—884; *Ex parte Falk*, 14 Ch. D., 446.

Inverarity and *Jardine* for the Defendants, Messrs. Ritchie, Stewart and Co.:—It is admitted that Dewhurst and Co. are unpaid vendors. They, therefore,

had a right to stop the 87 bales in transit. The transit lasted until the goods reached Bombay. Bevis, Russell and Co. were bound to ship to Bombay, and to Bombay only—Smith's Mercantile Law (10th Ed.), p. 690; *Lyon v. Hoffnung*, 15 Ap. Ca., 331; *Bethell v. Clark*, 20 Q. B. D., 615; *Ex parte Watson*, 5 Ch. D., 35. We further contend that we did effectually stop the bales in transit. Even those which were landed in Dock at the time notice was given were then still in transit—Benjamin on Sales (4th Ed.), p. 871. The 29th Bye-law of the Port Trust provides that goods which have been landed shall only be delivered on production of the bill of lading and a delivery order from the master or agent of the vessel. The bales *ex* "Clan Drummond" and *ex* "Hispania" were wrongfully delivered, and by such delivery our right could not be affected. As to the 62 bales, we got the bills of lading, and that was enough—*Ex parte Watson*, 5 Ch. D., 35, but besides that we gave notice to the ship-owners—Benjamin on Sales (4th Ed.), p. 882; *Phelps Stokes and Co. v. Comber*, 29 Ch. D., 813. We also contend that the plaintiffs did not pay for the goods. The Rs. 25,000 paid in by them on the 1st December was a deposit—*Berndtson v. Strang*, 37 L. J. Ch., 665; *Ex parte Hayman*, Ch. D., 11; *In re Rowland*, L. R., 1 Ch. Ap., 421.

Farran, J. :—This suit has arisen out of the failure of the firms of Bevis, Russell and Co., of London and other places, and of Bonn, Ashley and Co., of Bombay. As is not unusual in such cases, the questions, which have to be decided in it, are of some nicety. At the close of the case I thought that I had satisfactorily solved them all, and so expressed myself. Further consideration has caused me to modify my [73] views in some particulars, and to feel that the difficulties are somewhat greater than I then supposed.

The facts, though somewhat involved, are not much in dispute. The plaintiffs, a firm of piece-goods merchants in Bombay, seek to establish their right to 87 bales of grey shirtings which they purchased from Bevis, Russell and Co., and which they allege that they paid for before the failure of that firm. By their plaint, however, they offer to pay anything which may still be due in respect of the bales. The bales have been sold since suit by arrangement between the parties embodied in an order of Court dated the 24th February 1891. The decree will determine what is to be done under that arrangement and order.

The defendants at present on the record are the members of the firm of Ritchie, Stuart and Co, George Wreford, the chief Official Receiver of the London Bankruptcy Court, and J. Whinney, trustee of the estate of Bevis, Russell and Co. The Official Assignee, C. A. Turner, is also a defendant, but nothing is now claimed by or against him, and his presence on the record has long since become unnecessary. The firm of Ritchie, Stuart and Co. are attorneys for the firm of Geo. and R. Dewhurst, of Manchester, who claim the bales as unpaid vendors, and have stopped them in transit and also under arrangement which they allege that they have made with Wreford, Pixley and Whinney as representing Bevis, Russell and Co., Ritchie, Stuart and Co. are also the attorneys of the defendant Wreford. They are not personally interested in the matter. Wreford and Ritchie, Stuart and Co. were made parties to the suit on the 19th January 1891. As against them the suit began on that day.

It will be convenient to consider, first, the rights of the plaintiffs in respect of the 87 bales as against the firm of Bevis, Russell and Co., and their representatives in bankruptcy; secondly, what rights Dewhurst and Co. have derived from these representatives, and what rights they were entitled to put in force as unpaid vendors of the bales, and how far they effectually exercised these latter rights.

[74] On the 12th and 14th of August 1890, the plaintiffs by telegram ordered from Bevis, Russell and Co. 100 bales grey shirtings. The exact terms of the order are contained in the plaintiffs' letter to Bevis, Russell and Co. of

the 15th August. It is only necessary to note here that the price was 7s. 10d. per piece f. o. b. November-December shipment, and that such price bore interest, from shipment at all events, at 5 per cent. This order was accepted by Bevis, Russell and Co. In order to be in a position to execute the plaintiffs' order, Bevis, Russell and Co. ordered goods of the required description from Dewhurst and Co. The memorandum of sale by Dewhursts to Bevis, Russell and Co. is dated 15th August 1890. Bevis, Russell and Co. on the 18th August confirmed the purchase, and on the 1st September directed, in correction of a previous direction, the 100 bales to be marked (J. N. S. Bombay). These are the initials of the

plaintiffs' firm Jairam Narranji and Sons. In connection with Dewhursts' claim to stop the goods in transit, it will be necessary to examine with accuracy the terms upon which this sale was made. For the present purpose it need only be stated that the goods were to be delivered f. o. b. at Liverpool.

Dewhurst and Co. accordingly despatched the 100 bales, bearing the plaintiffs' mark, to Liverpool in different lots. There Bevis, Russell and Co. had them shipped in eight different vessels, as follows:—

13 bales by the "Nubia."
13 bales by the "Clan Drummond"
12 bales by the "Hispania."
12 bales by the "Eden Hall."
13 bales by the "Inchulva."
13 bales by the "Roumania."
12 bales by the "City of Edinburgh,"
12 bales by the "Wistow Hall."

These steamers were what were called "Conference" steamers. By agreement between their owners and the Bombay Piece-goods Association, the former carry the goods of members of the Association at a fixed rate of freight. The plaintiffs were members [75] of the Association; and Bevis, Russell and Co. had standing orders to ship plaintiffs' goods by "Conference" vessels.

Bevis, Russell and Co. consigned the 100 bales to Bombay in their own names, having the bills of lading made out to their own "order or to his or their assigns." The freight was paid by Bevis, Russell and Co. in Liverpool on plaintiffs' behalf, and insurance was effected by Bevis, Russell and Co. for the plaintiffs. It is unnecessary to state the date of the several shipments. They were all made before the 1st December 1890, save the 12 bales by "Wistow Hall" which were shipped on that day. On the several lots being shipped, Bevis, Russell and Co. accepted bills of Dewhurst and Co., payable three months, I think, after date of their invoiced price, f. o. b.

There can, I think, be no doubt but that on the goods being so shipped, if not at an earlier date, the property in them passed from Dewhurst and Co. to Bevis, Russell and Co. (see Benjamin on Sales (4th Ed.), p. 322); and from the latter, by reason of the plaintiffs' contract with Bevis, Russell and Co., to the plaintiffs. The terms of the plaintiffs' contract show that this was the intention of the parties. If it can be said that, by reason of the bill of lading being taken by Bevis, Russell and Co. in their own name payable to their order, the legal property in the goods was, after their shipment, in Bevis, Russell and Co., these latter were then trustees of that legal property for the plaintiffs, having a lien on the bills of lading, the symbols of the goods, and upon the goods themselves for their price and charges incurred in respect of them. I think, however, the correct view is that the property in the goods was in the plaintiffs, Bevis, Russell and Co. having, by holding the bills of lading, the

constructive possession of the goods and the legal right to their actual possession and to retain the same until their price was paid by the plaintiffs with the charges.

The bills of lading of the bales by "Nubia," "Clan Drummond" and "Hispania" Bevis, Russel and Co. endorsed in blank and sent by post to the firm of Benn, Ashley and Co. in Bombay. The "Nubia" arrived in Bombay in November. Benn, Ashley and Co. endorsed the bill of lading of the goods by her to the plaintiffs. The plaintiffs under it received the 13 bales [76] ex "Nubia". The plaintiffs did not then make any specific payment in cash for the goods, but they had a sum standing to their credit in a book kept by Benn, Ashley and Co. called the "Goods Indenters' Hundi Account". I shall more particularly refer to it hereafter. On this account no doubt they were given delivery of the 13 bales without making any specific payment. The invoices of the 25 bales per "Clan Drummond" and "Hispania" arrived in Bombay previously to the 1st December (probably on 14th November), showing the amount due by the plaintiffs for the 13 bales per "Clan Drummond" and the 12 per "Hispania" on the 31st October and 3rd November respectively. They were handed to the plaintiffs. On the 1st December the plaintiffs paid Rs. 25,000 to the firm of Benn, Ashley and Co.

It is an important question in the case whether this payment is to be considered as a payment for or on account of the 100 bales or not. The defendants contend that it was not a payment for the bales, but was, in fact and in law, a deposit by the plaintiffs with the firm of Benn, Ashley and Co., out of which the plaintiffs intended probably to pay for the goods, but that, as the plaintiffs did not fix the rate of exchange so as to convert it into sterling, it never became a payment for the goods to Bevis, Russell and Co. Before mentioning the oral evidence upon the subject I will notice the manner in which this payment is treated in the books of Benn, Ashley and Co. The first to refer is the "Goods Indenters' Ledger". In this the invoices, on their arrival are entered to the debit of the dealers. The invoices per "Nubia", "Clan Drummond" and "Hispania" are accordingly entered to the plaintiffs' debit on the 31st October and 14th November, respectively, the invoices of goods per "Clan Drummond" and "Hispania" on the latter date. The sterling price shown in the invoice is the amount so entered. This was the only debit to the plaintiffs in the books of Benn, Ashley and Co. on the 1st December. The plaintiffs had no account with that firm, but their goods purchase account. The Rs. 25,000 paid in by the plaintiffs on the 1st December are entered in the cash book thus - Janam Narranji and Sons. Received from them Rs. 25,000 on account. On what account. The natural conclusion to draw is that they were received on [77] account of the only debit in the books against the plaintiffs, but as the sums paid exceeded that debit the further inference arises that they were paid on account of the transaction of which that debit forms a part. The cash book entry is posted in the ledger to the plaintiffs' account and credit. That entry is colourless and throws no light on the object of the payment. It is, however, also carried to the plaintiffs' credit in the "Goods Indenters' Hundi Account". This shows, I think, clearly on what account the parties intended the payment should be treated as made. It could not be carried directly to the plaintiffs' credit in the "Goods Indenters' Ledger", as that account was kept in sterling. Before that could be done rupees had to be artificially valued into sterling and in that condition transferred from the "Goods Indenters' Hundi Account" into the "Goods Indenters' Ledger". As far as the books show, that conversion might have been an arithmetical calculation carried out by any

calculator in the office. Looking at the books alone, the plaintiffs would appear to have paid for the 100 bales when they paid the Rs. 25,000 into the firm of Benn, Ashley and Co.

The plaintiff Khimji Jairam swears that he paid in the Rs. 25,000 to pay for the 100 bales, and that he did so thus early to save interest, which was running against the plaintiffs. (He made the same statement on 6th December 1890, and again on 7th January in reply to Exhibit O). He calculated, he says, from the invoices already received the probable price of the whole (the invoices of the bales per "Clan Drummond" and "Hispania" were exactly a quarter of the whole), and paid in Rs. 25,000 to cover the total cost. Mr. Macdonald, the manager of the firm in Bombay and an ostensible, though not an actual, partner in it, confirms the plaintiffs' evidence on this point. The after conduct of the partners points in the same direction. Mr. Macdonald and the Official Assignee, after the insolvency of Macdonald, calculated the sterling value of the money paid by the plaintiffs on account of goods purchased, and placed the sum to the plaintiffs' debit in the "Goods Indenters' Hundi Account," carrying it to their credit in the "Goods Indenters' Ledger." This may have been unauthorized after Macdonald had received notice of the bankruptcy of the English firm, but when it was notified to the representatives in bankruptcy of the English [78] firm, they entered the sum to the credit of the plaintiffs in the books of the English firm. The plaintiffs now stand credited in the books of Bevis, Russell and Co. with the price of 100 bales in sterling. The plaintiffs have not repudiated this action of Macdonald.

Again this strong body of evidence we have the remark of Macdonald in his letter of the 10th January 1891:—"Owing to the low rate of exchange the dealers would not remit, but left the money with us in deposit." This is not evidence against the plaintiffs, but I have to consider it, inasmuch as a book-keeper of the firm said, in answer to a leading question, that the contents of the letter were correct. Macdonald's attention was not drawn to it when he was cross-examined. It is really of no value, as the remark applies to about fifty dealers. It may have been correct as to forty-nine of them, yet not correct as to the plaintiffs. On looking through the cash book of Benn, Ashley and Co. I find that when moneys were deposited with Benn, Ashley and Co., the fact is so stated in the cash entry with the rate of interest. The evidence of the plaintiff Khimji is sought to be impeached by a reference to the former course of dealing between the plaintiffs and the firm of Benn, Ashley and Co., and by a consideration of the improbability of the plaintiffs making a payment for goods, as to some of which they did not know whether they had been shipped or not. It would be improper, I think, to disbelieve positive evidence as to the payment for the goods in question, if and because it can be shown that in previous instances the plaintiffs had made a deposit with Benn, Ashley and Co., and not a payment for goods, the deposit, being subsequently applied in payment for the goods. But nothing of the kind has been shown. To render the argument of any value, we should have to consider each particular case in connection with all the circumstances connected with it, and if, after such consideration, we found that in most cases the plaintiffs made a deposit, and not a payment in the first instance, some inference might be drawn from that fact unfavourable to the plaintiffs' contention. So far, however, as I can judge, it was the plaintiffs' practice to make a large payment in rupees, when the early invoices of any of their indents arrived, and to settle the exchange; or, in other words, to adjust the account [79] when the indent was completed, or nearly so. Khimji is not strictly accurate. On the whole, I think him an honest and careful witness when he

says that the exchange was always fixed within a week or fortnight after the payment of a sum by him to pay for goods. Longer intervals occurred. The strongest instance relied upon by the defendants is in the case of the transaction immediately preceding the present. On the 19th July and 4th August, Khimji paid in Rs. 8,000 and Rs. 2,000 respectively. The sterling was not fixed till September 12th. Just, however, when their payment was made, it will be seen from Exhibit H, that invoices of the plaintiffs' goods were arriving in considerable quantities and the plaintiffs were being debited with their amount. From the books alone I should draw the inference (as in this case) that the payment of the Rs. 8,000 and Rs. 2,000 were payment on account of goods, though the account was not adjusted for a considerable time after the payment was made. On the other hand, I myself see nothing improbable in the plaintiffs making the payment in question, even though they were not certain that the goods had been shipped. Khimji, however, tells us that Macdonald told him that the goods would come (*i.e.*, were coming), and so he made the payment. I have arrived at a very positive conclusion that the plaintiffs intended to pay the Rs. 25,000 on account of the goods, and that Macdonald received the money on that account.

I also am of opinion that it was, in law, a payment for the goods. It was argued that the money paid in rupees was not and could not be payment for goods priced in sterling. That is not so. Payment may be made in any medium which the parties mutually agree to give and accept. In India a guest may pay his hotel bill with English sovereigns if the host will accept them. The present case is much stronger, for the plaintiffs never, on any occasion, paid for their goods except in rupees. Having regard to the course of business, the contract was really to pay Benn, Ashley and Co., on behalf of Bevis, Russell and Co., as many rupees as would make up the price of 100 bales expressed in sterling.

[80] Then it is said that there was no payment till the exchange was fixed. That, again, I think, was not so. The payment was made, but until the exchange was fixed it could not be known how much change the plaintiffs were entitled to get back. Till that was done, the proper entries could not be made to close the transaction, just as in the case of the English sovereigns given to the hotel clerk in payment of the hotel bill. Lastly, it is said that payment was in rupees to Benn, Ashley and Co., while the payment had to be made in sterling to Bevis, Russell and Co., and it is argued that the two firms were distinct, as Macdonald was an ostensible, though not a real, partner in Benn, Ashley and Co. That may be so in the case of bankruptcy for the purpose of regulating the distribution of the assets; but, in respect of transactions before bankruptcy, it certainly seems to me that a payment to Benn, Ashley and Co. was a payment to Bevis, Russell and Co.; but, if that were not so, Benn, Ashley and Co. were certainly agents to receive payment in the manner in which the plaintiffs paid. The cash book entries were sent home each week to Bevis, Russell and Co., to let them know how the defendants' accounts stood. It was open to Bevis, Russell and Co. not to receive payments for indent goods in rupees unless the exchange in respect of the rupees paid was at once fixed, but for mutual convenience the other course was adopted with the assent of Bevis, Russell and Co. The plaintiffs' payment was, in my judgment, good in law. At the time of the payment, Macdonald had the bills of lading in his hands of the goods shipped per "Clan Drummond" and "Hispana." He was quite ready to hand them endorsed to the plaintiffs, but the plaintiffs did not ask for them, as the vessels had not arrived. On the payment being made, Benn, Ashley and Co., in Bombay, held these bills of lading in trust for the plaintiffs, freed from any lien or claim on

their part. Similarly, in London, Bevis, Russell and Co. held the bills of lading, in respect of the 62 bales shipped in the steamers "Eden Hall," "Inchulva," "Roumania," "City of Edinburgh" and "Wistow Hall," in trust for the plaintiffs.

On the 4th of December 1890, Bevis, Russell and Co. suspended payment, and on the same day a receiving order was made vesting their assets in the defendant Wretford. On the next [81] day, F. W. Pixley was appointed special manager of the estate. The bills of lading for the 62 bales were then handed by Bevis, Russell and Co. to Pixley. It was not argued before me, and I do not think that it could have been successfully contended, that under the order and disposition clause of the English Bankruptcy Act, 1883, (Stat. 46 and 47 Vic, c. 52), or otherwise, Wretford or Pixley acquired by the vesting order any other or different right to the bills of lading of the 62 bales which they held in London, or to the bills of lading of the 25 bales held by Benn, Ashley and Co., or to the goods of which those bills of lading were the symbols, than that in which Bevis, Russell and Co. and Benn, Ashley and Co. held them immediately before their suspension. The point was not expressly conceded or admitted, but it was not, on the other hand, expressly contended for. I, therefore, do not enter upon it more fully. If that be so, Wretford or Pixley became trustee of these bills of lading and of the bales represented by them for the plaintiffs. The bills of lading for the 62 bales at that time bore the endorsement, in blank, of Bevis, Russell and Co.

Macdonald filed his petition in insolvency in Bombay on the 10th day of December 1890. Under the vesting order made upon that petition the defendant C. A. Turner claimed to be entitled to hold the assets of Benn, Ashley and Co. in Bombay. Macdonald handed the bills of lading per "Clan Drummond" and "Hispania" to C. A. Turner endorsed in blank apparently.

On the 8th December 1890, the plaintiffs filed this suit against Bevis, Russell and Co. and Benn, Ashley and Co., and Macdonald for a declaration of their right to the 25 and 62 bales, and consequential relief. On giving security the plaintiff Khimji Jairam was appointed *interim* receiver of the bales. On the 16th December Mr. Turner endorsed the bills of lading per "Clan Drummond" and "Hispania" to the plaintiff Khimji Jairam. These vessels had before then arrived in Bombay. The plaintiff Khimji Jairam under that endorsement received the 13 bales ex "Clan Drummond" on the 23rd December 1890, but not those ex "Hispania" till much later. On the 9th December 1890, the Official Receiver, Wretford, had caused a telegram to be sent to Ritchie, Stuart and Co., to protect the [82] goods of Bevis, Russell and Co. and Benn, Ashley and Co. on his behalf in Bombay. Ritchie, Stuart and Co. accordingly claimed the assets from C. A. Turner on the 10th December. Since then Ritchie, Stuart and Co. have represented the Official Receiver of the bankrupt firms in Bombay. Prior to the 21st of December 1890, they received the bills of lading for the 62 bales from Pixley. On the 30th of December 1890, the plaintiffs by their solicitors' letter (Exhibit, J.) demanded these bills of lading from Ritchie, Stuart and Co. To this letter Ritchie, Stuart and Co. replied by their solicitors' letter of the 31st December, that they had received the bills of lading from Pixley with his orders not to deliver until completion of the payments. They accordingly refused to deliver the bills of lading to the plaintiffs. On the same day, Ritchie, Stuart and Co. wrote to the plaintiffs offering to deliver the 62 bales to the plaintiffs, as they arrived in Bombay, on payment of their invoiced price. On 21st January they demanded payment from the plaintiffs of £2,008.

In the view I have taken of the case, the plaintiffs were entitled, as against the representatives of Bevis, Russell and Co. and Benn, Ashley and Co. in bankruptcy, to the bills of lading and the goods represented by them without further

payment. Ritchie, Steuart and Co., as attorneys for the Official Receiver, had not, therefore, the right to withhold the bills of lading of any of them, or the bales, from the plaintiffs.

The firms of Bevis, Russell and Co and Benn, Ashley and Co. were adjudged bankrupt on the 14th of February 1891, and the defendant J. Whinney was appointed their trustee on the 16th February 1891. He was subsequently added as a defendant to this suit. The bankrupts made an arrangement with their creditors, under which they have paid, or secured their creditors, a composition of 6s. in the pound. Their bankruptcy was, therefore, annulled on the 5th August 1891. The defendant J. Whinney makes no claim to any of the 87 bales, or their proceeds. All assets which C. A. Turner collected belonging to the estate of Benn, Ashley and Co. in Bombay he has made over to the defendant J. Whinney.

[83] It follows, from what I have said, that the representatives in bankruptcy of Bevis, Russell and Co. and Benn, Ashley and Co. had no rights to the 87 bales in dispute to confer on Geo. and R. Dewhurst, and that firm can claim no rights in the bales conferred by these representatives. They have not, however, purported to confer any rights on Dewhurst and Co. or assigned any rights to that firm. The claim of Dewhurst and Co. to the 87 bales depends, therefore, in my judgment, altogether on their right, as unpaid vendors, to stop the goods in transit.

Before I enter upon a consideration of their rights in that respect I shall clear the ground by stating that, in my judgment, they have not lost, since suit, the rights (if any) which they possessed when it was filed against them, I mean by reason of the agreement which they have entered into with the defendant Whinney on 31st July 1891. So far as the plaintiffs and the 87 bales are concerned, the agreement amounts to this:—Dewhurst and Co. are to recover the 87 bales, or their proceeds, from the plaintiffs, if they can, and are to give up their claim to the Rs. 25,000, and, giving credit for what they may receive in respect of the 87 bales, are to provide for the difference in bankruptcy, or under the deed. This is not so stated in so many words, as the 87 bales in question are only one of many consignments to a very much larger extent made by Dewhurst and Co. under similar circumstances, and the agreement relates to all the goods sold by Dewhurst and Co. to Bevis, Russell and Co., for which they have not been paid, but in effect that is the arrangement as to the 87 bales. I, at one time, thought that, if Whinney held the Rs. 25,000 in trust for Dewhurst and Co. under the terms of the invoices under which Dewhurst and Co. had sold them, the arrangement was a fraud on the plaintiffs, as Dewhurst and Co. gave up a fund out of which they were entitled to pay themselves for the 87 bales; but I am now satisfied that the Rs. 25,000 had been before bankruptcy mixed up with the other moneys of the bankrupt firm, and could not be followed or ear-marked, and that, therefore, Wroford first and Whinney after him did not hold any fund in trust to pay Dewhurst and Co. for the 87 bales. It is not necessary to consider what would have been the result if they had done so. Possibly it would have been a case of sub-rogation. I give no opinion upon it. I also think that Dewhurst and Co. have not been paid 4s. or 6s. in the pound on the price of the 87 bales. Notwithstanding the endorsements of that 4s. payment on the bills, the truth is that it was paid in the balance estimated to remain due to Dewhurst and Co. after their securities, including the 87 bales in question, had been realized—a balance which is still open to final adjustment.

In this view it is unimportant to consider why Dewhurst and Co. were not made parties to this suit.

It is admitted that Dewhurst and Co. were, upon the suspension of Bevis, Russell and Co., unpaid vendors of the 87 bales and entitled to the exercise of all rights which unpaid vendors possess, including the right to stop the bales in transit. The first question, which arises, is whether that right did not cease when Bevis, Russell and Co. received (if they received) and shipped the bales at Liverpool. That depends upon the terms upon which Dewhurst and Co. sold the goods to Bevis, Russell and Co., and started them upon their journey. The memoranda of sale and purchase of the goods in question already referred to do not profess to be more than mere memoranda. The terms upon which the sale took place must be taken to be the usual terms upon which Bevis, Russell and Co. were in the habit of purchasing goods from Dewhurst and Co. These are set out in the invoices. They are similar in the case of all the shipments. The following is the wording of one of them:—

"Invoice of 12 bales goods marked J. N. & S. 159/175 shipped per 'Eden Hall,' Bombay, consigned to Messrs. Benn, Ashley and Co. there on account of the concerned. Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the protection of their acceptances of Geo. and R. Dewhurst's drafts against this or any of these shipments."

The letter of Dewhurst and Co. enclosing their draft for acceptance for the price of the goods repeats the terms as to the specific appropriation of the proceeds. The letter of Bevis, Russell and Co. notifying acceptance of the draft confirms the arrangement. From these documents and the oral evidence given in commission it appears to me that when Dewhurst & Co. forwarded the goods to Bevis, Russell and Co. at Liverpool, and sent the carrier's receipts with the name of the steamer by which they [85] were to be forwarded, they really started the goods on their voyage to Bombay, consigned to Benn, Ashley and Co. there, and that though Bevis, Russell and Co. at Liverpool had the power, by reason of their possession of the indicia of title to the goods, to alter their destination there and to start them on a different voyage, yet to have done so would have been a breach of faith on their part towards Dewhurst and Co., if not a violation of the express terms of their contract. At Liverpool, Bevis, Russell and Co. never had actual physical possession of the goods. That was always in the hands of intermediaries for the purposes of the voyage; and though Bevis, Russell and Co. shipped the goods in their own name, they did so in pursuance of the contract between them and Dewhurst and Co. They did not impart to the goods a new destination. This circumstance differentiates the present case from *Ex parte Miles*, 15 Q. B. D., 39, and brings it within the authority of *Ex parte Watson*, 5 Ch. D., 35. The fact that it was the firm of Bevis, Russell and Co. who attended to the shipping arrangements in Liverpool, does not render the voyage, which, in its inception, was intended to be a voyage to Bombay, a voyage first to Liverpool and then from Liverpool to Bombay. It is not sufficient, so to say, to break the continuity of the voyage—*Lyon v. Hoffnung*, 15 Ap. Ca., 391, approving *Bethell v. Clark*, 20 Q. B. D., 615. The transit lasted, in my opinion, until the bales were, as it is called in some cases, "at home" in Bombay. Until then the right of Dewhurst and Co. to stop the goods in transit lasted.

I have next to consider whether Dewhurst and Co. did effectually stop the goods, or any of them, in transit so as to defeat plaintiffs' title to them.

On the 6th December Dewhurst and Co. wrote to the Receiver giving him notice that they claimed all shipping documents, goods, and proceeds of goods and remittances in respect of shipments to Benn, Ashley & Co., Bombay, for which Geo. and R. Dewhurst drew bills, and requiring him to apply the same proceeds and remittances towards payments of such bills in accordance with the terms of the invoice headings. On the 9th December Dew-

[86] Dewhurst and Co. caused a telegram to be sent to Ritchie, Stuart and Co.: "Dewhursts request give every assistance Macdonald, Benn, Ashley and Co., protecting their interest," and on the 10th December another telegram: "Dewhursts claim (to have) goods sold by them and proceeds specifically applied to pay bills against goods. Sending p/a." This was notified to Benn, Ashley and Co. Since then Ritchie, Stuart and Co. have acted for Dewhurst and Co. in Bombay as well as representing the Official Receiver in the bankruptcy proceedings. After the sending of these telegrams, negotiations took place between Dewhursts and the Official Receiver. There is, in my judgment, no foundation, either in fact or in law, for the argument that they amounted to a stoppage of the goods in transit on the part of Dewhursts.

The letters which passed between the parties and the oral evidence alike show that on the 11th December it was arranged that the Official Receiver and Pixley should carry out the sale of Dewhursts' goods which had been made to native constituents for cash, through Ritchie, Stuart and Co., and that Ritchie, Stuart and Co. should hold the proceeds of such goods to the joint account of the Official Receiver and Dewhursts. When this arrangement was made, it was not known that the plaintiffs claimed the 87 bales, nor was it known that the Official Assignee asserted an adverse interest to that of the Official Receiver. At that time Dewhursts relied on their remedy under the specific appropriation clause in their invoices. This claim was not then actually admitted by the Official Receiver, but it does not seem to have been seriously disputed. Its validity was left to be determined thereafter.

On this arrangement being come to, the joint telegram of the 12th December was sent to Ritchie, Stuart and Co., in order that they might carry it out. This telegram was not in the exact form the parties had agreed on. That will be found at the back of Exhibit 68 and in Exhibit 72 to the commission: "Please carry out sales to natives delivering goods against cash only and remit proceeds to England in joint names of Pixley and Dewhursts." This arrangement was not communicated to the shipowners, and it did not, of course, contemplate a stoppage of the goods in transit [87] by Dewhursts. It is in these respects altogether different from the arrangement in *Ex parte Watson*, 5 Ch D., 35. In pursuance of it, Pixley sent forward the bill of lading of the 62 bales to Ritchie, Stuart and Co. He did not part with, and did not intend to part with the bill of lading of the 62 bales, except to his agents, nor to deprive himself of such advantages as the possession of the bill of lading conferred upon him, though the proceeds of the goods were to be remitted to the joint account of himself and Dewhursts. Mr. Wade's letter, which was probably written after Pixley's expresses the arrangement more accurately than Pixley's, and must be considered the guiding one. Dewhursts' solicitors' letter by the same mail shows the view which they took of the position. Before it was written, Dewhursts had received the telegram of 11th December, notifying the Official Assignee's adverse claim to all goods consigned to Benn, Ashley and Co. In consequence of this claim, on December 13th Dewhurst and Co. had a telegram sent to Ritchie, Stuart and Co. directing them to stop, in transit, a large number of bales including the 25 bales *ex* "Clan Drummond" and "Hispania." They also sent instructions to the agents of the "Clan Drummond" and "Hispania" in England to stop these bales, but as these were later in date to the steps actually taken in Bombay I need not further refer to them.

I now come to the steps taken on behalf of Dewhurst and Co. in Bombay. On the 15th December the solicitors of Ritchie, Stuart and Co. wrote to Benn, Ashley and Co., that they had instructions to stop in transit, amongst

the bales, the 25 bales *ex* "Clan Drummond" and "Hispania;" but as Macdonald was then insolvent, and had long before parted with all documents to the Official Assignee, this notice cannot be treated as of any value as a stoppage in transit of these bales, even if under any circumstances a notice to the consignees can be treated as effectual as a stoppage. I think that it cannot: see on this point *Phelps Stokes and Co. v. Comber*, 29 Ch. D., 813. The solicitors of Ritchie, Stuart and Co. on the same day wrote to the Official Assignee, informing him that they had stopped the 12 bales *ex* "Hispania" in the hands of [88] the Port Trust, and also of steps which they had taken as to the 13 bales *ex* "Clan Drummond" then expected. It appears from this letter that previous to its date Graham and Co. had given a delivery order for the 13 bales *ex* "Hispania." The notice of stoppage to the Official Assignee was valueless as in itself a stoppage in transit. It was apparently written after the notices presently to be referred to.

On the morning of the 15th December, Ritchie, Stuart and Co. gave notice to Graham and Co., agents for the "Hispania," to stop the 12 bales which had been brought by that vessel. It would, however, appear that, previous to that notice, the goods had been landed in the Dock. Mr. Ker, on behalf of Ritchie, Stuart and Co. acting for Dewhurst and Co., went to the Prince's Dock, and found the bales landed there. He, thereupon, gave the Dock authorities notice to stop them. At this time a delivery order for the goods had been granted by Graham and Co. For reasons, which I shall presently assign, I have come to the conclusion that this was an ineffectual attempt to stop these particular bales, and that the plaintiffs' title as to them must prevail over that of agents of Dewhurst and Co. The goods were "at home" before the notice to stop was given. It is unnecessary to refer to other letters put in on this part of the case. The tortious act of the carrier, after the goods are "at home," cannot defeat the purchaser's right—*Bird v. Brown*, 4 Ex., 786.

On the same morning of the 15th December, Ritchie, Stuart and Co. gave notice to Finlay, Muir and Co., agents for the "Clan Drummond," to stop the 13 bales by that vessel in transit. At the time this notice was given, it appears, from the evidence of Mr. Ker, that these bales were still on board the "Clan Drummond." He went to the Prince's Dock and ascertained that fact. He also gave notice to the Dock authorities to stop the goods. At this time the goods were, without doubt, in the possession of the master of the "Clan Drummond," and, therefore, were still in the carrier's hands, and liable to be stopped. It was, it appears to me, the duty of the agents at once to have communicated that notice to the master of the "Clan [89] Drummond," and the notice to the agents is, therefore, equivalent to a notice to him—*Kemp v. Falk*, 7 App. Ca. at p. 585. The bill of lading had not, at this time, been endorsed or handed to the plaintiff Khimji, but was in the hands of the Official Assignee of Macdonald, who did not hold it in any better right than that of Benn, Ashley and Co., a right which the unpaid vendors were entitled to defeat. I think, therefore, that this notice to stop was in time to defeat the plaintiffs' title to the 13 bales. It is unnecessary to refer to the further correspondence on this point. On the 23rd December the 13 bales were delivered to the plaintiff Khimji, as receiver and under the endorsement of the bill of lading, by the Official Assignee. It is, I think, clear law that a wrongful delivery of goods by the carrier after notice to stop in transit does not defeat the right of the unpaid vendor—*Sett v. Cowley*, 7 Taunt, 169.

I now come to the 62 bales of which Pixley offered delivery to the plaintiffs on the 31st December, if they would pay for them. Under the agreement of the 11th December between Dewhurst and Co. and the Official Receiver

to which I have already referred, Ritchie, Steuart and Co.; in my judgment, held them as agents for the Official Receiver and Pixley, and not for Dewhursts. The letter of Messrs. Conroy and Brown of the 8th January 1891, is erroneous in stating that they were held for Dewhurst as well. It was the proceeds of the goods which were to be held on joint account and not the bill of lading. This possession of the Official Receiver and Pixley, who were trustees of the bill of lading for the plaintiffs, enured for the benefit of the plaintiffs against Dewhurst and Co. On the 31st of December, Ritchie, Steuart and Co. on behalf of the Official Receiver and Pixley sent round notices to the agents of the five different vessels, in which the 62 bales had been shipped, to hold the goods for them, stating that they held the bills of lading. These notices were all received before the series of notices, next to be referred to, on behalf of Dewhursts were sent out. At that time four of the vessels, at least, were in the Dock. The dates of discharge of the bales in question were as follows:—

[90] "Eden Hall" had on the

	2nd January 1891, discharged						9 bales, leaving undischarged
"Inchulva"	do.	do.	do.	0	do.	do.	13
"Roumania"	do.	do.	do.	13	do.	do.	0
"City of Edinburgh"	do.	do.	do.	12	do.	do.	0
"Wistow Hall"	do.	do.	do.	12	do.	do.	0
				Total discharged		Undischarged	
				46		16	

On the evening of the 2nd January 1891, therefore, 46 bales were in the hands of the Dock authorities, and 16 bales were still on board the "Inchulva" and "Eden Hall."

On the 2nd January Ritchie, Steuart and Co. wrote notices to the several agents of the above steamers, on behalf of Dewhurst and Co., of stoppage in transit of the above bales, except in the case of the "Wistow Hall," in respect of which no notice was given. At the end of the letter there was also a notice to stop in transit on behalf of the Official Receiver, but as in respect of these particular bales he was not an unpaid vendor, the notice on his behalf may be disregarded.

These notices were all delivered on the 3rd January. As to the 16 bales then on board the steamers, I must hold, for the same reasons I gave in the case of the "Clan Drummond," that notices to stop in transit on behalf of Dewhursts were in time. The title of Dewhurst and Co. to these must prevail. It must also prevail, I think, as to the 13 bales ex "Roumania." The notice given to Graham and Co., the agents of the "Roumania," on the 15th December 1890, related not only to the bales per "Hispania," but also to "any other bales shipped on account of Geo. and R. Dewhurst to Messrs. Benn, Ashley and Co." This notice was, no doubt, indefinite, but still it covers the shipment by the "Roumania," and was given in time to prevent the bales per "Roumania" reaching "home." As to the 12 bales per "Wistow Hall" out of the remaining 33 bales which were in the Prince's Dock on the 2nd January, no notice of any kind on behalf of Dewhurst and Co. has been proved, and to these the plaintiffs are entitled.

The position of the remaining 21 bales raises questions of great doubt and difficulty. I regret that as to them the case was not more fully argued. In what capacity did the "Trustees of the [91] Port" hold such goods? Bombay Act VI of 1879 constitutes them a public body, and imposes certain duties upon them. Amongst other things it constitutes them wharfingers, and for their duties as such they are to levy tolls and charges under section 43. Being a public body they are bound to receive on their wharves and in their sheds all

goods properly tendered to them. Section 62 provides that, if the master or owner of any vessel before landing goods at any wharf of the Board shall give the Board notice in writing that such goods are to remain subject to a lien for freight or other charges payable to the shipowner, such goods shall continue liable to the same lien (if any) for such charges as they were subject to before the landing thereof. The goods, however, are to lie in the warehouse and sheds of the Board at the risk and expense of the owners liable to be sold to pay the above lien and the Board's charges. The sections in the Bombay Act relating to this subject are similar to those under which goods are landed at "Sufferance" wharves in London and elsewhere. The effect of landing goods at such wharves was much considered in *Barber v. Meyerstein*, 4 Eng. and Ir. App., 317, and in *Glyn Mills Co. v. East and West India Dock Co.*, 7 Ap. Ca., 591. In the latter case there was much difference of opinion amongst the several Judges, before whom the case came, as to whether the goods after being landed were held under a contract or not, and, if yea, with whom. The view on this point held by BRETT, L. J., in the Court of Appeal was, I think, that adopted in the House of Lords, viz., that the goods are landed under the provisions of the statute, and held under the same provisions, and that there is no contract with any one. In the statute there considered, as here also, there was no provision as to how and to whom delivery was to be made, and it was held that the landing of the goods made no difference in that respect, and that the wharfingers were for this purpose placed in the same position as the master, and had to make delivery according to the exigencies of the bill of lading handed to them duly endorsed. A further proposition is also, I think, to be gathered from the judgments delivered in the House of Lords, namely, that as long as the goods are subject to a stop order for freight, the bill of lading has not discharged its office, and that the [92] goods are subject to incidents arising out of the original contract contained in the bill of lading.

From this it would seem to follow that so long as they are subject to a lien for freight the transit has not ended. The goods are not at home. The converse proposition would, however, seem also to be true, that when the shipowner lands the goods under the statute, and his freight has been paid, his right of control and lien over the goods is gone, and thenceforth the goods are held by the statutable wharfingers for the consignee alone. In the present case, as the freight was in every instance prepaid, the masters of the several vessels, when they landed the plaintiffs' goods at the Prince's Dock, had no longer any control or lien over them. The Dock authorities held them under the provisions of the statute for the holders of the bills of lading, i.e., the Official Receiver, and Pixley represented by their agents, Ritchie, Stuart and Co., who in turn held these bills of lading as trustees for the plaintiffs. If that is the correct view, the goods ceased to be in transit when landed.

Great difficulty is, however, introduced by the 59th rule of the Bye-laws of the Port Trust, which is this:—"Goods landed at the Dock shall only be delivered on production of bills of lading accompanied by a delivery order from the master or agent of the vessel." This delivery order is, no doubt, intended as a voucher that the freight has been paid, and that there is no lien under section 62 of the Act. Does the non-obtaining of it by the holder of the bill of lading keep up the transit until it has been obtained, when there is no freight due, and no lien on the part of the master? On the whole I have come to the conclusion that it does not. The rule, I think, was not intended to have, and has not, any effect on the rights of consignees, but is merely a departmental rule to prevent servants of the Board from delivering goods subject to the master's lien. I do not see how the agent of a steamer could be compelled to

give such a delivery order. The goods, as I have shown, are not under his control, after being landed free of freight. This seems to be the view of the Dock authorities. The shed master under pressure of the cross-examination seems to me to have put the delivery order on too [93] high a footing. In the case of the "Hispania," however, it must be remembered that the bill of lading was endorsed with the delivery order of the agents before Dewhurst and Co. gave notice of the stoppage on the 13th of December. As to the 21 bales also, I think that, when the Official Receiver gave his notices of the 31st December, the case must be treated as if he had obtained delivery orders at that time.

Whether that be so or not, I am of opinion that, in respect of the goods which were landed before Dewhurst and Co. gave their notice of stoppage on the 3rd of January, no notice of stoppage in transit has been proved to have been given to proper persons. The Dock authorities were not the servants of the several agents to whom notices were given, and no duty was cast on the several agents to give information of them to the Dock authorities. The agents' duties as to the goods were over when they had been landed under the provisions of the statute. Accordingly, when the latter gave up the goods in March under the endorsement upon the bills of lading of Ritchie, Stuart and Co. which must be taken to have been made by them as agents of the Official Receiver and Pixley, they are not shown to have received any notice of stoppage in transit, and, therefore, the title of the plaintiffs to the 21 bales, which I am now considering, is superior to that of Dewhurst and Co.

The result is that under terms of the consent order of the 24th February 1891, the plaintiffs must pay Dewhurst and Co. through Ritchie, Stuart and Co. the invoice cost of 42 bales (see note), with interest at 5 per cent. per annum from their due dates to payment.

All parties to bear their own costs respectively.

Attorneys for the Plaintiffs:—Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for the Defendants:—Messrs. *Conroy and Brown.*

NOTE.—The 42 bales in respect of which it was held that good notice to stop in transit had been given, and for which, therefore, the plaintiffs had to pay (see order of 24th February *supra*, p. 71), were made up as follows:—13 bales *ex* "Clan Drummond" and 13 bales *ex* "Roumania" stopped by the notice dated the 15th December 1890, and 13 bales *ex* "Inchulva" and 3 (out of 12) *ex* "Eden Hall" which were still on board and undischarged on the 3rd January 1891.

[94] APPELLATE CIVIL.

The 8th October, 1891.

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE PARSONS.

Shekh Adam Isufbbhai.....(Original Defendant) Appellant

• versus

Jamnadas Ranchordas and others.....(Original Plaintiffs) Respondents.*

Civil Procedure Code (Act XIV of 1882), Sec. 283—Suit to establish right to attach—Onus of proof—Right of defendant in such suit to set up the title of a third person where defendant's own title derived from such persons
 • *is tainted with fraud—Decree—Execution—Registration—Registration Act III of 1877, Secs. 21 and 60—Description of property not contained in body of the deed of conveyance, but inserted as a foot-note.*

Faizulla owned a house in Surat. On the 21st August 1882, he was adjudged a bankrupt by the Supreme Court of the Straits Settlements, within whose jurisdiction he was then carrying on business as a merchant. On the 20th February 1891, he executed a conveyance of the house to Mr. Carew, the trustee in bankruptcy, for the benefit of his scheduled creditors, of whom the defendant was one. The defendant held a mortgage on the house for advances made by him to Faizulla. Mr. Carew had an agent in India, one Nazar Mahomed, with whom the defendant was a partner in business. On the 20th November 1884, the plaintiffs obtained a decree for Rs. 78,000 against Faizulla and another person, and in execution of this decree they attached the house in question as the property of Faizulla. Prior to the attachment the defendant, in consideration of the mortgage-debt due to him, had obtained a transfer of the house from Carew with possession. No further consideration was paid by him at the time of the transfer. On the attachment being levied by the plaintiffs, the defendant claimed the house as purchaser from Carew, and the attachment was raised. The plaintiffs then filed this suit under section 283 of the Civil Procedure Code (Act XIV of 1882) to establish their right to attach the house as the property of their judgment-debtor. The plaintiffs (the respondents) contended that the transfer of the house by Carew to the defendant was fraudulent, the defendant being a partner of Carew's agent, and no consideration having been paid for the transfer. The defendant (appellant) contended that it was sufficient for him to show that Carew's title was good, and that, if the house had validly passed to Carew, it could not afterwards be attached for Faizulla's debt. The plaintiffs (respondents) on the other hand argued that the defendant ought not to be allowed to set up Carew's title; that the transfer by Carew to him was fraudulent, and that he ought not to be allowed to benefit by his own fraud.

Held that the defendant was entitled to set up Carew's title as a defence, although he might have been guilty of fraud in his subsequent dealings with Carew. If Carew's title neither originated in, nor was upheld by, any fraud of the defendant, and if the plaintiffs' claim failed on proof of Carew's title alone, the [95] defendant would not benefit by his own fraud, but by the proof of a title paramount to that of both plaintiffs and defendant.

In a suit brought under section 283 of the Civil Procedure Code (Act XIV of 1882) to establish the right to attach property, it is for the plaintiff to prove that the property in question is the property of the judgment-debtors. The onus of proof is upon him. He can have no right to attach property which is proved either never to have belonged to his judgment debtor, or having been his, to have passed out of his possession and ownership, and

* Appeal, No. 88 of 1891.

become, in law, the property of others prior to the time at which attachment is sought. The defendant in defending such a suit may, therefore, rely on the title of a third person.

A conveyance of immoveable property did not contain, in the body of the deed, a description of it sufficient to identify it. In a foot-note, however, such a description was given, and it was signed by the assignee only. The deed was accepted by the Registrar, and was registered, and a certificate to that effect was given under section 60 of the Registration Act (III of 1877). The deed being tendered in evidence was objected to on the ground that it ought to be treated as unregistered, since it had been improperly accepted for registration by the Registrar.

Held, that the error in accepting it, if error there was, did not invalidate the registration: see *Sah Mahan Lal v. Sah Koonlan Lal*, L. R., 2 Ind. Ap., 210.

APPEAL from the decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat, in Suit No. 237 of 1885.

One Faizulla was the owner of a house at Surat. On the 21st August 1882, he was adjudged bankrupt by the Supreme Court of the Straits Settlements, within whose jurisdiction he was carrying on business as a merchant, and on the 20th February 1884, he executed a conveyance of the said house to Carew, the trustee of the property of the bankrupt, for the scheduled creditors, of whom the defendant, Shekh Adam I-ufbhai, was one. Carew had an agent in India, one Nazar Mahomed, with whom the defendant was a partner in business.

On the 20th November 1884, the plaintiffs obtained a decree in Surat against Faizulla and one Abdulali for Rs. 78,000, and in execution of this decree they attached the house in question as the property of Faizulla. Prior to the attachment the defendant, who, as above stated, was a creditor of Faizulla and who held a mortgage on the house for advances made by him, obtained a transfer of the house from Carew as trustee in consideration of his mortgage-debt. No further consideration was paid by him at the date of the transfer. On the attach-[96]ment being made by the plaintiffs, the defendant claimed the house as purchaser from Carew, and the attachment was raised. The plaintiffs then filed this suit, under section 283 of the Civil Procedure Code (Act XIV of 1882) praying for a declaration that the house was the property of their judgment-debtor Faizulla, and that they were entitled to attach it.

The Court of First Instance passed a decree for the plaintiffs, holding that the purchase by the defendant was void as against all the creditors of Faizulla, including the plaintiffs.

In appeal, a question was raised as to whether the house had ever belonged to Faizulla. The Court held, on the evidence, that it had been his property.

Vcaji (with *Gokalias Kahandas Parekh*) for the Appellants.

Branson for the Respondents.

Jardine, J., (holding, on the evidence, that the house had been Faizulla's property, continued):—The house which thus belonged to Faizulla was undoubtedly conveyed by him to Carew.

Exhibit 32 shows that Faizulla was adjudged bankrupt by the Supreme Court of the Straits Settlements on the 21st August 1882, and this adjudication was followed by a conveyance of the house executed by Faizulla on the 20th February 1884, in favour of Carew, who was the Sheriff of Singapore and trustee of the property of the bankrupt for the scheduled creditors (Exhibit 85).

This conveyance was executed prior to any attachment of the property by the plaintiffs (prior indeed to their decree), and would have been a perfectly valid and legal conveyance under the law of this country. The only objection raised against its validity is that it ought to be treated as unregistered, since it was

improperly accepted for registration by the Registrar of Bombay. This was the view taken by the Subordinate Judge, who, however, (as is here admitted) made a mistake in saying that it was registered too late, so that the case he relied on—*Raya v. Anapurnabai*, 10 Bom. H.C. Rep., 98,—has no application. But his other remark is true, *viz.*, that “the assignment contains no description of the immoveable property sufficient to identify it” in the body of the deed, though such a [97] description is given in a foot-note. Section 21 of the Indian Registration Act, 1877, enacts that “no non-testamentary document relating to immoveable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same.” It does not particularise where the description shall be contained, and in the present case the Registrar may have thought that the provisions of the law were sufficiently complied with, in that the proper description was given in a foot-note signed by the assignee only, especially as Faizulla admitted the execution and genuineness of the document to him and signed an endorsement to that effect. Be this as it may, the document was registered, and a certificate to that effect was given under section 60. The error in accepting it, if error there was, cannot, we think, be held now to invalidate the registration. The Judicial Committee of the Privy Council make the following observations in the case of *Sah Mukhun Lal Panday v. Sah Koonan Lal*, 15 B. L. R. P. C., 228 at p. 235: S. C. J. R., 21 A., 210 at p. 216. —“It is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21 or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words “defect in procedure” in section 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance.” Section 21 of the Act there referred to (XX of 1866) is the same as section 21 of the Act now in force (Act III of 1877). On this point of construction we have referred also to the Full Bench decision in *Hardei v. Ram Lal*, I. L. R., 11 All., 319, and the authorities on which it proceeds, and we are of opinion that the document must be held to have been registered in accordance with the provisions of the Act (see section 49). The second point, therefore, is found in the affirmative.

• The purchase by the defendant from Carew has been held by the lower Court to be void as against Carew and all the creditors [98] of Faizulla, including the plaintiffs, because the defendant who purchased the property was the partner of Carew's agent, Nazar Mahomed, and no consideration was paid for the transfer. It has not been attempted by argument in this Court to contest this point, the counsel for the appellant being content to rest his case upon the assignment to Carew under which the legal title to the property in suit had passed from Faizulla.

• It was, however, contended on behalf of the respondents, that to allow the defendant thus to rest his defence on proof of Carew's title would be to set up a new case for him, and would also enable him to benefit by his own fraud. Neither of these contentions are, in our opinion, sound. It is no new case for the defendant to allege that the property could not be attached, because it had been conveyed to Carew, and, therefore, no longer belonged to Faizulla. Such a plea was raised in the Court of First Instance, embodied in an issue and decided. The abandonment or rather the abstention from argument in this appeal of the further point, whether the defendant purchased from Carew, cannot make the case a new one, for the case remains the same only it is curtailed by the omission of a final link which, if redundant, need never have been added, but of which, if

essential, the omission would be fatal. The contention that to allow the defendant to rely on Carew's title will be to enable him to benefit by his own fraud, rests on a misconception. It is plain that, if Carew's title neither originated in, nor is upheld by, any fraud of the defendant, and if the plaintiffs' claim fails on proof of Carew's title alone, the defendant will benefit not by his own fraud, but by the proof of a title paramount to that of the plaintiffs and that of the defendant himself, and as injurious, therefore, to the defendant as to the plaintiffs. We think, therefore, that, if the defendant can under ordinary circumstances set up against the plaintiffs' claim the title of a third person, he can clearly set up the title of Carew in the present case, though he may have been guilty of fraud in subsequent dealings with Carew.

This brings us to the question, whether a defendant can rely on the title of a third person in defending a suit like the present, brought under the permission given in section 283 of the Code of Civil Procedure (Act XIV of 1882). The words of that section are [99] "the party may institute a suit to establish the right which he claims to the property in dispute." The right here claimed by the plaintiffs is the right to attach the property in dispute in execution of the decree they obtained against Abdulali and Faizulla on the 20th November 1884, for the sum of 78,000 and odd rupees. It is, we think, plain that they can be held to have established their right to attach this property under that decree only if they prove that it is the property of their judgment-debtors. They can have no right to attach property which is proved either never to have belonged to their judgment-debtors, or having been theirs to have passed out of their possession and ownership, and become in law the property of others prior to the time at which attachment is sought. The onus of proving that the property is their judgment-debtors' must lie on the plaintiffs, and whether or not the defendant has a title, the plaintiffs must prove their right to attach, *i. e.*, the title of their judgment-debtors. In the present case it is not proved that Abdulali ever had any title in the property in suit; on the contrary it is proved that Faizulla was the owner thereof; it is also proved that Faizulla on the 20th February 1884, conveyed the property to Carew, and that Carew was the legal owner thereof at the time of the attachment of it by the plaintiffs, and Carew is still the legal owner of the property if there has been no valid transfer of it from him to the defendant. Whether there has been a valid transfer or not, is a point for determination in a contest between him and Carew, not in a contest between the plaintiffs and the defendant. Indeed, the point is in no way material in the present suit, for no fraud committed by the defendant against Carew could have the effect of divesting Carew's title and re-vesting the property in the plaintiffs' judgment-debtor Faizulla.

For these reasons we are of opinion that it is unnecessary to decide whether or not the property was purchased by the defendant from Carew; we hold that the title of Carew can be relied on by the defendant; and since it is proved that the plaintiffs have no right to attach the house in execution of their decree we reverse the lower Court's decree, and order that this suit be dismissed with costs throughout on the plaintiffs' costs.

Decree reversed.

NOTES.

[See also 21 AL., 210, as regards the non-materiality of such defects in registration; and (1900) 25 Bom., 202, as regards the onus of proof in such suits.]

[100] APPELLATE CIVIL.

The 18th January, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE TELANG.

Giriapa.....(Original Defendant) Appellant

versus.

Ningapa.....(Original Plaintiff) Respondent.

Hindu law—Inheritance—Share of adopted son where a son is subsequently born—Western India—Mitakshara—Vyavahar Mayukha—Point taken by appellant on second appeal not raised by him in his first appeal—Practice

In Western India, both in the districts governed by the Mitakshara and those specially under the authority of the Vyavahar Mayukha, the right of the adopted son, where there is a "legitimate son" born after the adoption, extends only to a fifth share of the father's estate.

In a suit by an adopted son to recover his share in his adoptive father's estate a son having been born to the adoptive father subsequently to the plaintiff's adoption, the Court of First Instance awarded the plaintiff a fourth share of the property in dispute. The defendant appealed to the District Court, but in appeal raised no question as to the extent of the share awarded to the plaintiff. On second appeal to the High Court it was contended that, in any event, the plaintiff was only entitled to a fifth share.

Held, that under the circumstances and having regard to the nature of the question, the point might be taken in second appeal on behalf of the defendant, and the High Court varied the decree by awarding the plaintiff a fifth share instead of a fourth share, but ordered the appellant (defendant) to bear his own costs of the appeal.

THIS was a second appeal from the decision of T. Hart-Davies, Assistant Judge of Dharwar.

Suit by an adopted son. The plaintiff Ningapa alleged that he had been duly adopted twenty-three years previously by one Bhimapa Bhikshoti, and that after the adoption his adoptive father had executed a document in his favour, providing that, in the event of his (the adoptive father) having "legitimate sons" subsequently born to him, the plaintiff should receive a half share of his whole estate. Afterwards, and while the plaintiff was living with his adoptive father, the defendant was born.

The plaintiff, being dispossessed by the defendant, sued to recover a half share of the property.

The defendant, Giriapa Bhimapa, denied the plaintiff's adoption and his claim, and pleaded limitation.

[101] The Subordinate Judge (Rao Sahib Babaji Lakshman) found the plaintiff's adoption proved, and his claim not time-barred. He allowed the plaintiff a fourth share in the property in dispute.

On appeal the District Court confirmed the decree.

The defendant then appealed to the High Court.

Manekshah J. Taleyarkhan, for the Appellant.

There was no appearance for the Respondent.

Telang, J.:—The question raised in the argument of this appeal relates to the share of an adopted son, where a son is born to the adoptive father

after the adoption. The original text to which all the authorities on this question go back, is a text of Vasishtha*, which we find quoted in the various modern Digests. The different readings of that text as quoted in those works do, not require to be considered in the present case (see Colebrooke's notes at Stokes' Hindu Law Books, p. 421). All the principal text books of authority in Western India on the subject of adoption read the text so as to mean, that where a "legitimate son" is born after an adoption, the adopted son "shares a fourth part"†. And the question before us turns on the meaning of this equivocal phrase. The different significations of which the phrase is susceptible have been expounded in several modern text books‡; but without examining the grounds for the various interpretations, it is enough to say that in Western India the weight of authority strongly preponderates in favour of the view, that where one legitimate son is born after an adoption, the legitimate son takes four-fifths of the estate of the father and [102] the adopted son one-fifth. Taking the authorities in Western India on the subject of adoption as mentioned by WESTROPP, C. J., in *Narayan Babaji v. Nana Manohar*, 7 Bom. H. C. Rep., A. C. J., 153, we find that the Mitakshara sets out the text of Vasishtha, but says nothing about the interpretation of the phrase "a fourth share." It is to be noted, however, that Colebrooke's marginal note against this passage speaks of "a quarter of a share," thus probably indicating an interpretation identical with that which, as we shall see in the sequel, the Vyavahara Mayukha places on the phrase. A somewhat similar phrase occurs in connection with the provision for the marriage of unmarried daughters when a joint family is about to divide. And the Mitakshara has a long discussion on the interpretation of the phrase there used. But the words there (Stokes' Hindu Law Books, p. 398) are not identical with the words here, inasmuch as they do specify the estate or fund of which a fourth share is to be taken. And as we see from the Mitakshara's discussion of those words, they also have given rise to very considerable differences of opinion. But it is unnecessary to dwell on that passage further, as owing to the different language used, as already pointed out, it can throw no light on the meaning of the text which has to be construed here. The Vyavahara Mayukha to which we must next refer, is quite explicit as to the meaning of Vasishtha's text. In Chapter IV, section v, placitum 25, it is said: "He should take a quarter of the share allotted to a legitimate son of his adoptive father; from the (following) text of Vasishtha, 'when a son has been adopted, if a son of the body be afterwards born, the adopted son shall be a sharer of a portion equal to a fourth.'" The "fourth share," therefore, according to this view, is to be a fourth not of the whole estate, but of the share allotted to the "legitimate son." The Viramitrodaya affords no light on the subject, nor does the Dattaka Chandrika, both only setting out Vasishtha's text, and not expounding this phrase in it. The Dattaka Mimamsa only says that the adopted son "receives a quarter, not an entire share." But this explanation is not itself quite clear, and Mr. Sutherland proposes two different interpretations of it, one of which is in harmony with the view of the

* See Bühler's Vasishtha or Sacred Books of the East, Vol. XIV, p. 76. And see also Baudhayana in the same Volume, p. 336, where the words inserted by Dr. Bühler between brackets are to be noted (Comp. Stokes' Hindu Law Books, 595). The texts of Devala and Katyayana on the point are quoted in Dattaka Chandrika, Stokes' Hindu Law Books, pp. 657-8.

† Mitakshara, p. 420 (Stokes' Hindu Law Books); Mayukha, p. 66 (ditto); Viramitrodaya, by G. C. Sarkar, p. 124; Samskara Kaustubha, p. 49, (Bombay Ed., 1861, quoting Baudhayana); Dattaka Mimamsa, p. 594 (Stokes' Hindu Law Books); Dattaka Chandrika, p. 657 (Stokes' Hindu Law Books).

‡ See Rajkumar Sarvadhikari's Tagore Lectures, pp. 537-9; Mr. Justice BANARJI's Tagore Lectures, pp. 367-8; Dr. Jolly's Tagore Lectures, pp. 182-4.

[103] Vyavahara Mayukha, while the other is not*. Looking, however, at the original text of the Dattaka Mimamsa as printed in the edition published at Calcutta in 1857, and also in the edition published at Benares in 1874, we find that "not an entire share" is not quite an accurate translation of the words used by Nanda Pandita. The correct translation is "not an equal share." This latter phrase, too, does not perhaps make the point perfectly clear. It seems to contain an allusion to texts which apparently lay down an equal division between the adopted son and the subsequently born "legitimate son." Such texts are to be found cited in the Samskara Kaustubha for instance, (see passage cited below), and in the Dattaka Mimamsa itself (Stokes' Hindu Law Books, p. 595, and compare West and Bühler, p. 1187 and note (e) there). But at all events the phrase "not an equal share" rather appears to indicate that, in Nanda Pandita's view, the word "quarter" points to the relation between the shares of the after-born son and the adopted son, not the relation between the share of the latter and the whole estate. It may, therefore, be said to be at least very probable, that Nanda Pandita's view was in accord with that of Nilakantha. And the opinion of the author of the Samskara Kaustubha † appears also to be the same.

It is true, that in the Smṛiti Chandrika, a text metrical in form, not aphoristic like the one under discussion ‡, is quoted as belonging to Vasishtha. in which it is laid down, that "if after he is accepted (in adoption) a legitimate son is born, he becomes a sharer of a fourth share in the inheritance" §. And it is also [104] true, as I suggested in the course of the argument, and as I find has been already pointed out by Professor H. H. Wilson (quoted by Mayne as well as in West and Bühler's Digest), that to interpret the phrase "a quarter share" to mean a fourth of the whole inheritance would reconcile the two readings of Vasishtha's aphoristic text with each other, and both with the metrical text now referred to, namely, by taking one-third, where it occurs, to mean one-third of the after-born son's share, and one-fourth to mean one-fourth of the whole estate. This is true, though there are difficulties even on this construction, as for instance in the case of four or more sons being born after an adoption. But, apart from this and other difficulties, it is pretty clear that, according to the principle laid down by the Privy Council in the case of *The Collector of Madura v. Mootoo Ramlinga Sethupati*, 13 Moore's I. A., 1, the Court must give effect to what it finds to be the interpretation of, Vasishtha's text now actually current as shown by the modern Digests in general use, and not enforce as law a doubtful inference from the words of the ancient Smṛiti writers.

Passing now to the modern English text books, we find that Sir T. STRANGE leaves this point in uncertainty. In West and Bühler's Digest, it is said in one place that, "if a legitimate son be born after the adoption has taken place, the adopted son receives a fifth of the deceased's estate, according to the preceding question." According to the Mitakshara, Chapter I, section xi, placitum 24, the adopted son takes a fourth part" (W. and B., p. 373). The language thus used by the learned authors of that work seems intended to

* See Stokes' Hindu Law Books, p. 678. The other interpretation of Mr. Sutherland may be compared with the Mitakshara's views about the provision for daughters, at p. 398 of Stokes' Hindu Law Books. See also Stokes' Hindu Law Books, pp. 55, 426.

† This work is stated in Steele quoted at West and Bühler, p. 1187, to hold a different opinion. But the phrase used there, according to the reading of the Bombay edition, though perhaps not a very happy one, can only mean "one quarter of his share," which meaning agrees with the interpretation put on Vasishtha's text by the Vyavahara Mayukha.

‡ See as to this West and Bühler's Digest, p. 43.

§ See Smṛiti Chandrika, p. 57 (Calcutta Edition). In the translation by Mr. Krishnaswami Iyer, (p. 146) the words "in the inheritance," which occur in this printed text, are omitted.

convey the impression, that the "fourth part" referred to by the Mitakshara means one-fourth of the deceased's estate. But, as we have seen, the words there used contain nothing that can be said to be decisive on this point, and nothing inconsistent with the view of the Vyavahara Mayukha. In other passages of West and Bühler (*vide* pp. 388, 773, 935; also p. 1187), it is stated that the right of the adopted son is to "a fourth of a son's share" or to "a fourth part of a share" or "one-fourth of a share as compared with the full share taken by the begotten son." Mr. Mayne sets out the various [105] views of the subject which have been taken, and adds, relying on West and Bühler, p. 373, that in Bombay the rule has been construed to mean that the adopted son takes a fourth of the legitimate son's share. Mr. Jogendra Chandra Siromani, in his Commentaries on Hindu Law, takes the fourth to mean a fourth of the legitimate son's share. Dr. Jolly's opinion is also in favour of this interpretation. And in the very recently published Tagore Law Lectures on adoption by Mr. G. C. Sarkar, the same view is maintained. In Steele's book it is said that the proportion varies according to caste custom; but, in the case before us, no question has been raised with reference to any such custom.

As regards other authorities bearing on the subject, there is the answer of the Shastri quoted in West and Bühler in the case from Dharwar [page 373 (3rd Ed.)], and the present case comes from the same part of the Presidency. There is also the answer of another Shastri to the same effect, which apparently was acted upon by the Sadar Adalat, and is also mentioned by West and Bühler, p. 373. And, lastly, there is the decision of the High Court of Madras in *Ayyavu Muppanar v. Niladatchi Ammal*, 1 Mad. H. C. Rep., 45, based principally on the authority of the Sarasvati Vilasa. All these authorities, judicial and quasi-judicial, concur in the opinion that the right of the adopted son extends to only one-fifth of the whole estate, where there is one legitimate son² born after the adoption.

It appears to us, upon a review of all the authorities above referred to, that we ought to hold that in Western India, both in the districts governed by the Mitakshara and those specially under the authority of the Vyavahara Mayukha, the right of the adopted son, where there is a legitimate son born after that adoption, extends only to a fifth share of the father's estate.

The Subordinate Judge in this case awarded a fourth share to the plaintiff, and the defendant in his appeal to the District Court did not raise any question about the correctness of that award. In this Court, however, Mr. Manekshah has taken the point, and relied on the passage in Mayne's Hindu Law already quoted. We think, under the circumstances, and having regard [106] to the nature of the question, that the defendant may be allowed the benefit of our opinion, but he cannot be allowed the costs of this appeal. The decree will, therefore, be varied by substituting a fifth share instead of a fourth share, and the appellant must bear his own costs in this Court.

Decree varied.

NOTES.

[1. An adopted takes but a fifth share in competition with an *Aurasa* son:—(1905) 1 C.L.J., 388; (1915) 29 M.L.J., 710 (*smāras*).

• The rule applies only in such competition and does not apply where there is no such competition:—(1916) 40 Bom., 27 O.P.C., (adoptive father's brother's son); (1916) 20 C.W.N., 489 (*stridhana*, step-son), one being husband's son by adoption with one wife, the other being husband's *Aurasa* son by another wife).

2. As regards raising new points in appeal, see also (1892) 17 Bom., 303; (1902) 27 Bom., 452.]

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, MR. JUSTICE BAYLEY,
MR. JUSTICE BIRDWOOD, MR. JUSTICE JARVINE AND MR. JUSTICE FARRAN.

Umarkhan Mahamadkhan Deshmukh.....(Original Plaintiff) Appellant
versus
Salekhan and others.....(Original Defendants) Respondents.

*Interest—Enhanced rate in default of payment—Penalty—Liquidated
damages—Contract Act (IX of 1872), Sec. 74.*

A proviso for retrospective enhancement of interest, in default of payment of the interest, at a due date, is generally a penalty which should be relieved against, but a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties.

THIS was a second appeal from the decision of Rao Bahadur Ganpat Amrit Mankar, First Class Subordinate Judge of Thana with appellate powers.

The plaintiff, Umarkhan Mahamadkhan Deshmukh, sued to recover from the defendants a sum due under a mortgage-bond.

The portion of the mortgage-bond material for the purposes of this report was as follows :—

“ * * And as to the assessment and dues due to the Sarkar together with *zamindar's* cesses which are now payable and which may hereafter, on a survey being made, be decreased or increased, the same are mine. I will be paying the same as I have been paying them up to this time. You have nothing to do with the (payment of the) *dhara* (i.e. assessment) : should you perchance [107] have to pay the assessment, then interest on whatever amount you may have to pay on account of such *dhara* is to be calculated at the rate of one rupee per cent. per month, and should the balance out of the interest in *bhat* (paddy) remain unpaid, the interest in *bhat* is to be calculated at the rate of a quarter as much, that is, 25 per cent., *vadh savai pramane*. As to these, together with the principal sum, whatever the total amount may be found to be due to you on making the account, I will pay off the same at once. * * *

The defendant Salekhan admitted the execution of the mortgage-bond, but disputed the plaintiff's right to recover the amount claimed.

The High Court remanded the case for the decision on certain issues, including the following :—

“ Whether the high rate of interest agreed to be paid on interest not paid in any given year than on the principal, rendered the contract to that extent a penal one.”

The above issue was found by the Lower Appellate Court in the affirmative, and the plaintiff appealed against the finding.

Mahadeo Chimnaji Apte for the Appellant.

Ghantashan N. Nadkarni for the Respondents.

After argument the Appeal Court (SARGENT, C. J., and BIRDWOOD, J.) made the following order of reference :—

Having regard to the conflict of decisions between *Pava v. Govind*, 10 Bom., H. C. Rep., p. 382, and *Raghunathrav v. Yashvant*, P. J. for 1882, p. 223, on

the one hand and *Dullabhdas v. Lakshmandas*, I. L. R., 14 Bom., 200, on the other, we think it right to refer it to a Full Bench to decide—

Whether a clause in a bond enhancing the rate of interest on default of payment of the principal debt and interest at the time fixed is to be regarded as a penalty?

The case subsequently came on for argument before a Full Bench consisting of SARGENT, C. J., BAYLEY, BIRDWOOD, JARDINE and FARRAN, JJ.

[108] *Mahadeo Chimnaji Apte* for the Appellant :—The stipulation in the document with respect to the payment of interest on interest is not a penalty. The bond itself was passed for the amount due upon a sum under a former bond. The stipulation amounts to an agreement to pay compound interest. It is as damages and not as a penalty that higher interest is claimed on the balance of interest, which was to be paid in kind and not in cash. We admit that, if the enhanced rate be claimed from the date of the bond, it would be a penalty, but it is not so where it is claimed from the date of default. The agreement in question is of the latter kind. There is no conflict in the Bombay decisions so far as the first proposition is concerned; but with respect to the second, there is, we contend, that if a higher rate is to run from a subsequent date, it is not a penalty, having regard to the provisions of the Indian Contract Act (IX of 1872), section 74—*Rasaji v. Sayana*, 6 Bom. H. C. Rep., A. C. J., 7, decided before the Indian Contract Act came into force; *Pava v. Govind*, 10 Bom. H. C. Rep., 382; *Dullabhdas v. Lakshmandas*, I. L. R., 14 Bom., 200; *Raghunath Rao v. Yashvant*, P. J., 1882, p. 223; *Mackintosh v. Crow*, I. L. R., 9 Cal. 689; *Nanjappa v. Nanjappa*, I. L. R., 12 Mad., 161. The latter two rulings are expressly dissented from in *Baij Nath v. Shah Ali*, I. L. R., 14 Cal., 248, which lays down that a higher rate of interest is not of the nature of penalty under any circumstances. The same principle is laid down in *Basavayya v. Subbarazu*, I. L. R., 11 Mad., 294; *Rai Balkishen Dass v. Raja Run Bahadursingh*, I. L. R., 10 I. A., 162; *Appa Rao v. Suryanarayana*, I. L. R., 10 Mad., 203; *Sajaji Panhaji v. Maruti*, I. L. R., 14 Bom., 274; *Joshi Kalidas v. Koli Dadu Abhesing*, I. L. R., 12 Bom., 555, is not applicable, because there the agreement was to pay double the amount of the entire debt on default of payment of one instalment, and, therefore, it was held to be in the nature of a penalty—*Arulu v. Wakuthu*, 2 Mad. H. C. Rep., 205; *Adanky Ramchandra Rao v. Indukuri*, 2 Mad. H. C. Rep., 451. In the last case the enhanced rate of interest was 75 per cent., and yet it was held to be not a penalty.

[109] *Ghanasham N. Nadkarni* for the Respondents :—This is a penalty and not compound interest. The intention to pay compound interest must be clear on the face of the document. A Court of equity will not give effect to the clause in this mortgage—*Peachy v. Duke of Somerset*, White and Tudor's Leading Cases, Vol. II, p. 1245. The bond provides that a particular rate of interest shall be paid on the principal, but if the interest is unpaid, a higher rate of interest shall be paid on the balance of interest remaining unpaid. This is not compound interest. The clause in the bond is a threat to the debtor for the purpose of securing regular payments of interest, and ought to be relieved against—*Bansidhar v. Bu Ali Khan*, I. L. R., 3 All., 260; *Khairram Singh v. Bhawani Baksh*, I. L. R., 3 All., p. 440; *Dip Narain Rai v. Dipan Rai*, I. L. R., 8 All., 185; *Rasaji v. Sayana*, 6 Bom., H. C. Rep., A. C. J., 7. The parties did not really contemplate that the enhanced rate should be levied. The rule of equity laid down in *Sloman v. Walter*, White and Tudor's Leading Cases, Vol. II, p. 1257, should be followed. Section 74 of the Indian Contract Act (IX of 1872) supports our contention.

The earlier cases decided by the Bombay Court make no distinction between a condition to pay enhanced rate from the date of the document and to pay such a rate from a subsequent date—*Pava v. Govind*, 10 Bom. H. C. Rep., p. 382; *Raghunathrav v. Yashwant*, P. J., 1882, p. 223; *Cote on Mortgage*, p. 957; *Dickson v. Longh*, Irish Reports, Vol. XVIII, p. 518; *Tikamdas v. Ganga*, 11 Bom. H. C. Rep., p. 203. The idea of making a distinction with respect to a clause being penal or otherwise was for the first time started in *Dullabhdas v. Lakshmandas*, I. L. R., 14 Bom., 200. Section 74 of the Indian Contract Act (IX of 1872) does not interfere with the Court's equitable jurisdiction.

The judgment of the Full Bench was delivered by

Sargent, C. J. :—The question raised by this reference is one on which there has been a great diversity of judicial decision and opinion in the several High Courts of India. As to this Court, [110] however, we cannot doubt that until the Judges who decided the cases of *Dullabhdas v. Lakshmandas*, I. L. R., 14 Bom., 200, and *Sajaji v. Maruti*, I. L. R., 14 Bom., 274, reviewed the decision in *Rasaji v. Sayana*, 6 Bom. H. C. Rep., A. C. J., 7, *Motoji v. Shekh Husen*, 6 Bom. H. C. Rep., A. C. J., 8, and *Pava v. Govind*, 10 Bom. H. C. Rep., 382, by the light of the more recent decisions of the other High Courts, it has been always considered that an enhancement of the rate of interest in default of payment of the principal sum and interest at the day fixed in the bond was in the nature of a penalty whether the enhancement was retrospective taking effect from the date of the loan, or was prospective from the date of default of payment. An examination of the facts in *Motoji v. Shekh Husen* and *Pava v. Govind* can leave no doubt, we think, that the Court was in both cases dealing with prospective enhancement of interest, and in *Raghunathrav v. Yashwant*, P. J., 1882, p. 223, where it is plain that the question was as to the enhancement of interest from the day fixed for payment of the instalments, MELVILL and WEST, JJ., treated as well settled by the decisions in *Rasaji v. Sayana*, *Pava v. Govind* and *Tikamdas v. Ganga*, 11 Bom. H. C. Rep., p. 203, that the agreement to pay such increased interest was a penalty, and ought not to be enforced.

The effect of the recent decisions in *Dullabhdas v. Lakshmandas* and *Sajaji v. Maruti* is doubtless to distinguish between prospective and retrospective enhancement and to hold that the latter only is in the nature of a penalty,—a distinction apparently suggested to the Court by the judgment of WILSON, J., in *Mackintosh v. Crow*, I. L. R., 9 Cal., 689, disapproving of the decision of KEMP and PONTIFEX, JJ., in *Bichook Nath v. Ram Lochun*, 11 Beng., L. R., 135. That learned Judge treated the question as one to be determined exclusively by section 74 of the Contract Act, and whilst admitting that retrospective enhancement of interest may be a penalty, observed that "where the contract is merely that if the money is not paid at the due date, it shall thenceforth carry interest at an enhanced rate, he did not see how it could be said that there is any sum named as to be paid in case of breach. No one can say [111] at the time of the breach what the sum will be." In *Mackintosh v. Hunt*, I. L. R., 2 Cal., 206, GARTH, C. J., and MACPHERSON, J., had already decided that section 74 of the Contract Act was not applicable to the case of prospective enhancement of interest. In *Baij Nath v. Shah Ali*, I. L. R., 14 Cal., 248, however, we find MITTER and MACPHERSON, JJ., holding that the Contract Act is not applicable to either class of cases whether the interest be retrospective from the date of the loan or prospective after default, because they say "in neither case is a sum named in the contract as the amount to be paid in case of breach."

We agree with this view of the above section of the Contract Act, the sole object of which would appear to have been to provide for the class of cases to

which *Kemble v. Farren*, 6 Bing., 141, belongs, and in which the distinction between "liquidated damages" and "penalty" has given rise to so much difference of opinion in the English Courts. They are fully discussed by Sir G. JESSEL and the rest of the Court in *Wallis v. Smith*, 21 Ch. Div., 243. Assuming, then, that the question under consideration has to be decided, as we think it must, independently of section 74 of the Contract Act, is the Court precluded by section 2, Act XXVIII of 1855, from affording relief in any case? The Calcutta Court in *Baij Nath v. Shah Ali*, I. L. R., 14 Cal., at p. 254, express the opinion that the only law applicable is section 2 of Act XXVIII of 1855, which says that "in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties," and that the decision of the Privy Council in *Rai Balkishen Dass v. Raja Run Bahadur Singh*, L. R., 10 I. A., 162, supported that view. In that case the question turned upon the construction of a compromise or *solehnamah* embodied in a consent decree, and the Privy Council differing from the High Court (see page 165) expressed an opinion that neither the proviso that an enhanced interest at 12 per cent. instead of 6 per cent. should be paid from the date of the compromise in default of payment of the first instalment of the debt at the due date, nor the proviso for the same enhancement of interest on the en-[112]tire decretal money from the date of default of payment of any instalment other than the first until realization, was a penalty from which the debtor ought to be relieved. But we cannot agree with the Calcutta Court that it supports the view taken by that Court with respect to the application of section 2, Act XXVIII of 1855. The Privy Council do not allude to the Act in their judgment, but they treat the question exclusively as one, whether the proviso for enhancement was a penalty to be relieved against or an alternative stipulation. However, the effect of the above Act was considered by Sir M. WESTROPP in *Pava v. Govind*, 10 Bom. H. C. Rep., 382, where he says the equitable jurisdiction to relieve against penalties was not taken away by Act XXVII of 1855,—a view of the Act which is in accordance with that expressed by PONTIFFX, J., in *Bichook Nath v. Ram Lochun*, 11 Beng. L. R., 135, and which has always been acted on in this Court.

Passing, then, to the consideration of the question whether equitable relief should be afforded by the Court against a proviso for enhancement of interest in default of the payment of the principal sum, we cannot agree with the opinion expressed by the Calcutta Court in *Baij Nath v. Shah Ali*, that the decision of Mr. Justice WILSON and all the other similar cases cited by him in his judgment in *Mackintosh v. Crow*, I. L. R., 9 Cal., 689, must be considered as necessarily overruled. Every case of this nature, as pointed out by PONTIFEX, J., in *Bichhook Nath v. Ram Lochun*, 11 Beng. L. R., 135, must depend on its own circumstances. The instrument which their Lordships had to construe in *Rai Balkishen Dass v. Raja Run Bahadur Singh*, L. R., 10 I. A., 162, was of a very special character, and their decision that the provisos providing for an enhanced rate of interest, retrospective and prospective, were not of the character of a penalty, but alternative stipulations, can only be regarded as a decision on the language of that particular instrument. The English cases show that it is regarded as settled law that where an ascertained definite sum of a less amount is to be paid at a certain day, in default of which a large sum is to be paid, the Court will treat the latter as a penalty. It is so stated by the Judges in *Astley* [113] *v. Weldon*, 2 B. & P., 346. Sir G. JESSEL assumed it to be so settled in *Wallis v. Smith*, 21 Ch. Div., at pp. 274-5, and Lord Justice LINDLEY in his judgment in that case makes the following remark:—"Whether relief was given on the theory of oppression, or on the theory that the parties could not

have meant what they said, or whether by reason of the usury law. But it has long been settled that where a person agrees to pay a larger sum if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect that one would suppose it was intended to have." It is in virtue of this rule that it had been decided in *Holles v. Wyse*, 2 Vern., 289, and *Strode v. Parker*, 2 Vern., 316, that where the interest in a mortgage is fixed at a certain rate to be paid at fixed intervals, a proviso that if the interest is not paid punctually a higher rate shall be charged, is a penal clause, and will not be enforced. However, in *Burton v. Slattery*, 5 Brown's Parliamentary Cases, 233, the principal debt was payable by instalments with interest at 5 per cent., with a proviso that if not paid punctually the debtor was to pay 8 per cent., and the House of Lords directed the account to be taken on the basis of 5 per cent. on the instalments up to due date, but 8 per cent. subsequently up to payment. No reasons are given by the House of Lords for their decision, and it cannot, therefore, be said with certainty whether they considered the proviso for prospective enhanced interest to be not in the nature of a penalty, or a reasonable one which should not be relieved against. The decision in *Mackintosh v. Crow*, I. L. R., 9 Cal., 689, where the interest after default in payment at due date was thenceforth to be 10 per cent., may be supported on the latter ground, even if the proviso be regarded as a penalty.

Upon this review of the authorities we think the safer conclusion is that a proviso for retrospective enhancement of interest, in default of payment of the interest at due date, is generally a penalty which should be relieved against, but that a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the [114] primary contract between the parties, as may well be deemed to have been the case in *Buchook Nath v. Ram Lochun*, 11 Beng. L. R., 135, and *Pava v. Govind*, 10 Bom. H. C. Rep., 382.

Jardine, J. :—I concur in the general conclusion at the end of the learned judgment of the Chief Justice as an answer to the question which is propounded in general terms by the Division Bench. As one of the Judges who decided *Dulabhdas v. Lakshmandas*, I. L. R., 14 Bom., 200, and *Sajaji v. Maruti*, I. L. R., 14 Bom., 274, I wish to add that, in my opinion, this conclusion does not conflict with those decisions. In the latter case we observed :—"As laid down by the Privy Council in *Dimech v. Corlett*, 12 Moore P. C. C. at p. 229, the hinge on which the decision in every particular case turns, is the intention of the parties collected from the language they have used." In dealing with the authorities, the expressions of every Judge must be taken with reference to the case on which he decides—*Richardson v. Mellish*, 2 Bing., at p. 248. I would further add my concurrence in the view expressed that the equitable jurisdiction to relieve against penalties is not taken away by Act XXVIII of 1855 :—*Pava v. Govind*, 10 Bom. H. C. Rep., 382, and I think it unnecessary to express a final opinion on the scope of section 74 of the Indian Contract Act, 1872.

Decree confirmed.

NOTES.

- [1. A retrospective enhancement of interest has been treated in Indian case-law as penal :—(1906) 34 Cal., 150 P.C.; (1902) 30 Cal., 15; (1895) 22 Cal., 658; (1894) 16 Mad., 171.
2. A prospective enhancement is not *ipso facto* so treated :—(1898) 36 Cal., 300 at 307.
3. The amendment of the Indian Contract Act, 1872, sec. 74, in 1899 gives wider powers than the previous section.
4. The relief against penalty is given notwithstanding that the interest should remain the only one within the Interest Act, 1855 :—(1912) 36 Mad., 229 F.D. overruling (1902) 25 Mad., 343; (1898) 2 C. W. N., 234; 333; see also (1893) 15 All., 232.]

The 4th April, 1892.

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Gojabai and another.....(Original Defendants) Appellants
versusShrimant Shahajirao Maloji Rajo Bhosle.....(Original
Plaintiff) Respondent.**Hindu law—Inheritance—Stridhan—Devolution of stridhan belonging to a
childless widow—Grandson—Co-widow—Husband's nephew—Sapindas.*

A childless Hindu widow died, possessed of *stridhan* consisting of ornaments given to her on her marriage and of a house purchased by her out of her own separate income. She left her surviving (1) a co-widow; (2) the plaintiff, who was grandson of another co-widow; and (3) a nephew (i. e., brother's son) of her husband. She had been married in one of the approved forms.

[115] Held, that the plaintiff was a nearer *sapinda* of the deceased than either her co-widow or her husband's nephew, and, as such excluded both from inheriting the deceased's *stridhan*.

APPEAL from the decree of L. J. Fernandez, First Class Subordinate Judge of Poona, in Suit No. 161 of 1888.

The plaintiff sued to recover certain property as heir of Anandibai, widow of Shwaji Rajo Bhosle, Chief of Akalkot. The plaintiff was the grandson of a co-widow of Anandibai.

The property consisted of ornaments given to Anandibai on her marriage, and of a house purchased by her out of her own separate income.

Anandibai died at Poona on the 19th April 1888, leaving her surviving (1) a co-widow, Kamaljabai; (2) the plaintiff, who, as above stated, was the grandson of another co-widow; and (3) one Tulajirav, who was her husband's nephew.

The defendants set up a deed of gift, as well as a will, purporting to have been passed by the deceased Anandibai in their favour, and also contended that the plaintiff was not entitled to inherit the deceased's *stridhan* in preference to Kamaljabai or Tulajirav.

The Subordinate Judge held that both the deed of gift and the will relied upon by the defendants were fabrications, and that the plaintiff was the heir of the deceased Anandibai. He, therefore, decreed the plaintiff's claim.

Against this decision the defendants appealed to the High Court.

Vasudev G. Bhandarkar for the Appellants:—The property in dispute was Anandibai's *stridhan*. She having died childless, the question is, who is her heir? We contend that either her co-widow or her husband's nephew would be a nearer heir than the plaintiff, who is a grandson of another co-widow. The Mitakshara states in Chapter II, section xi, placitum 11, that the *stridhan* of a childless woman devolves first on the husband, and failing him, on *taṭ-pratya-sannah*. This expression may mean either "her nearest relations," or his nearest relations. If we look to the context, it would have to be interpreted in the [116] former sense. And this is the interpretation put upon the words

* Appeal No. 57 of 1890.

by the Mayuka in Chapter IV, section x, placitum 28. The language of the Mitakshara being vague and ambiguous, the rule as laid down by the Mayuka, which follows the Mitakshara in this matter, should be adopted. According to the Mayuka, on failure of the husband's childless woman's *stridhan* passes to her nearest kinsmen in her husband's family. In Chapter IV, section x, placitum 30, the Mayuka states who are her nearest kinsmen. Reading placitum 30 with placitum 28, the rule to be deduced is that the heirs to the *stridhan* of a childless widow are, next to the husband, the kinsmen enumerated in placitum 30, who belong to the husband's family. According to this interpretation, Tulajirav, who is the husband's nephew, is the heir to Anandibai's *stridhan*, and not the plaintiff. Even if the words *lat praty sannah* be taken to mean the husband's relations, they should be taken in the sense in which a commentator like Kamalakara has understood them, viz., as referring to the heirs specified in the Mitakshara. See West and Bühler, p. 518. This appears to be a reasonable interpretation, as the author of the Mitakshara would not have used the vague words "husband's heirs," unless they were meant to refer to the well-known line of heirs which would make them definite. The *Smṛiti Chandrika* also gives a similar rule of succession in Chapter IX, section 3, placitum 38. According to this interpretation, Anandibai's co-widow would be the heir.

Latham, Advocate General (with him *Ghanasham Nilkanth*) for the Respondent:—The interpretation sought to be put on the Mitakshara is quite novel. The rule, as generally understood, is that, if a woman dies without issue, the heirs to her *stridhan* are the *supindas* of the husband. A step-son precedes a co-widow—West and Bühler, 521; Mayne's *Hindu Law*, section 622; Banarji's *Tagore Law Lectures*, pp. 375, 377. The plaintiff is, therefore, the heir to Anandibai's *stridhan*.

Vasudev G. Bhandarkar, in reply, cited *Bachha Jha v. Jagmon Jha*, I. L. R., 12 Cal., 318. In the present case the step-son predeceased Anandibai. The point is not covered by any authority.

[117] *Telang, J.*:—The only point of law which arises in this case relates to the devolution of Anandibai's property after her death. In the Court below, that property was dealt with as forming part of Anandibai's *stridhan*, and it has been similarly dealt with in the argument before us. We must, therefore, treat it on the same footing. It must also be assumed, as in the absence of all evidence it was rightly assumed by the Subordinate Judge, that Anandibai's marriage was in one of "the approved" forms.

Looking, then, at the case on this basis, the questions which arise for consideration are, first, whether the plaintiff, as grandson of Anandibai's husband, has any right at all to Anandibai's *stridhan*; and, secondly, whether, if he has such a right, that right is preferable to the right of Anandibai's fellow-widow Kamaljabai or her husband's nephew Tulajirav.

Now the general rule is that laid down in the Mitakshara, Chapter II, section xi, pl. 25: "on failure of grandson, also the husband and other relatives above mentioned are successors to the wealth" Stokes' *Hindu Law Books*, p. 464. The "other relatives" thus vaguely indicated here are more definitely described in placitum 11, where it is said that, "on failure of him, it goes to his nearest kinsmen (*supindas*) allied by funeral oblations. According to

* See West and Bühler (3rd Ed.), p. 21; and see, too, *Ganganam Balia*, P. J. for 1876, p. 31.

† Stokes' *Hindu Law*, p. 461. I have retained Colbrooke's words here, but the rendering here given of '*supindas*' is not correct for this Presidency. See *Lallubhai v. Manku-varbai*, I.L.R., 2 Bom., 423 et seq.; S. C. on appeal I. L. R., 5 Bom., 121.

the rule as thus expressed, the points to be determined in this case are, whether the plaintiff is a *sapinda* of Anandibai's husband, and, if so, whether he is a nearer *sapinda* than Kamaljabai or Tulajirav. On both points there can be no doubt. The definition of *sapinda*, which must be taken to be the one applicable in this Presidency, clearly and in terms (see *Lallubhai v. Mankuvarbai*, I. L. R., 2 Bom., 423) includes a grandson, and indeed no definition of that term excludes him. And it is clear that a man's lineal descendants are nearer *sapindas* of his than any collateral relatives. Therefore, according to the doctrine of the Mitakshara, as expressed in the words extracted above, it follows that the plaintiff excludes Kamaljabai as well as Tulajirav from inheriting the *stridhan* of Anandibai.

[118] It was, however, argued that the true meaning of the Mitakshara in the passage above extracted must be taken to be different from what is expressed in Colbrooke's translation; and that when it is correctly interpreted, the Mitakshara is in favour, not of the husband's nearest kinsmen inheriting a woman's property, but the woman's nearest kinsmen in the husband's family doing so. And for this interpretation, reliance was placed on the passage in the Vyavahara Mayukha, see Stokes' Hindu Law, p. 105; Mandlik's Hindu Law, pp. 97-8, dealing with this matter. Although, as will presently be seen, it is not quite necessary to decide this point in the case before us, I may say, seeing that it has been argued, that the inclination of my own opinion is in favour of Mr. V. G. Bhandarkar's contention. For, I think, our general principle should be to construe the Mitakshara and the Mayukha so as to harmonize with one another wherever and so far as that is reasonably possible, cf. *Krishnaji Venkatesh v. Pandurang*, 12 Bom. H. C. Rep. p. 65. And on the point now under consideration, it is possible to harmonize them, if both the Mitakshara and Mayukha are understood to refer to the same heirs, only by different description. — the Mitakshara describing them as *sapindas* of the husband, the Mayukha as *sapindas* of the wife in the family of the husband. But, even accepting to the full Mr. Bhandarkar's contention on this point, and construing the Mitakshara in the sense which Nilakantha places upon its language, I do not see how we can properly arrive at a different conclusion from that above stated. The wife having, by her marriage, been "born again in the husband's family" and having become "half the body of the husband," the *sapindas* of the husband necessarily become her *sapindas*, and their degrees of propinquity to the husband and wife must be held [119] to be identical, unless some specific reason to the contrary is shown. Now we have seen that the plaintiff is the nearest *sapinda* of Anandibai's husband, and the question, therefore, is whether any specific reason can be shown for holding him not to be the nearest *sapinda* of Anandibai. It is said that one such reason is furnished by the text of Sumantu quoted in the late Rao Sahib Mandlik's Hindu Law, p. 352. It appears to me, however, that Mr. Bhandarkar's ingenious argument on this point clearly involves a fallacy. The text itself, it is to be first remembered, makes no reference to the *sapinda* relationship at all, and does not profess to modify the definition of it. It only enumerates certain relatives, and

* The Viramitrodaya adopts Vinaneshwara's mode of describing the heirs. And see West and Buhler, p. 517, and notes. The Madama Parijata, p. 666 (Bibliotheca Indica Ed.), adopts the same mode as that of the Mayukha.

† Cf. *Sri Raghunadha v. Sri Brozu Kashmo*, I. R., 31 A., 191 (S. C. I. L. R., 1 Mad., 81); *Lallubhai v. Cassibai*, I. L. R., 5 Bom., 121; and see Mr. Justice BANARJI'S Tagore Lectures, p. 444, for a reference to a Smṛiti text on this point.

‡ I. L. R., 2 Bom., 123; cf. BANARJI'S Tagore Lectures, p. 138. There appears to be some mistake there in the citation from Manu, but it is not material for present purposes.

§ Cf. West and Buhler, p. 518; also I. L. R. 5 Bom., 121, and BANARJI'S Lectures, p. 436.

states that they are within the prohibited degrees for purposes of marriage. It is true, as Mr. Bhandarkar argued, that the definition of the term "*sapinda*," which has been applied in the rules regarding inheritance, is itself originally given in the section relating to marriage. But it does not, therefore, follow that a special rule about particular relations, which in terms refers to marriage only, but says nothing about *sapindas* generally, or the ground of the *sapinda* relationship, can be used to limit that definition of *sapindas* for all purposes whatever. In reference to the text in question, Mr. Mandlik has expressed an opinion, that "the preponderance of authority, at any rate on this side of India," is in favour of the view that "*sapinda* relationship in the case of the step-mother :..... extends only to those relatives through the step-mother who are specifically mentioned in the above text." For the purposes of the present case, it is quite unnecessary to examine the authorities relied on for this position. Assuming it to be correct, as I am inclined to think it is, it is plain that Mr. Mandlik himself did not intend it to apply to matters of inheritance, but only to marriage (see Mandlik's Hindu Law, pp. 316, 357, 389—91). And when it is remembered that step-brothers, for instance, are not named in Sumantu's text, it is easy to perceive that that text cannot [120] be properly regarded as exhausting the *sapinda* relationship through a step-mother for purposes of inheritance. Again, it is laid down by Manu in a familiar text (Ch. IX, pl. 183[†]), that the son of a man by one of his wives is as a son to all his wives. Sumantu's own text, too, says that the wives of a man's father are all mothers; and they cannot all be his mothers, without his being the son of them all, and his son their grandson. And such being the true character of the relationship, it would plainly be impossible to give any effect to Mr. Bhandarkar's argument even if it were in itself of any validity. Further, we have the cases collected in West and Bühler at page 521 *et seq.*, showing that a step-son, a step-daughter-in-law, and a half-brother of the husband are included within the *sapinda* relationship. And in *Motiram v. Majaram*, P. J. for 1880, p. 119, the son of the step-daughter of a widow was held to be the heir to such widow. Lastly, Mr. Bhandarkar's own argument proceeds upon the footing that the rival widow is a *sapinda*. It is impossible, then, to hold that a rival widow's grandson, being within the numerical limits of the *sapinda* relationship, is not also a *sapinda*. And upon the whole I am of opinion that the reasons for holding the rival wife's grandson to be a *sapinda* are so strong, that to hold otherwise would be to afford an illustration of a *dictum* attributed to Sir J. COLVILLE, to the effect that a certain proposition may be absurd logic, but it may nevertheless be good Hindu law. I am bound to say that I entirely deny the justice of that *dictum* and what it implies. And I cannot sanction a doctrine to which, when coupled with other established rules, it will be fairly applicable.

This point has been so fully discussed, that the next argument urged on behalf of the defendants can be very briefly disposed of. It is said that the view of Kamalakara, the author of the *Vivada Tandava*, is unfavourable to the recognition of *sapinda* relationship between a woman and the grandson of her rival wife. And this argument is based on the absence of all mention of the son or grandson of the rival wife in the summary of [121] Kamalakara's view as presented in West and Bühler's Digest, pp. 517-8. The whole discussion there, however, shows, in my opinion, that this is not in accordance with the view of the authors of the Digest, who it is to be

† As to whose rights of inheritance, see Stokes' Hindu Law Books, p. 445 and p. 89.

† See Manu by Bühler in Sacred Books of the East, p. 305, and note there, with which cf. West and Bühler, 522.

† In *Teencowree Chatterji v. Dinonath Banerji*, 3 Cal. W. R. 49, an opinion is expressed in favour of a step-son by adoption being entitled to a woman's *stridhan*.

remarked, subsequently include the step-son as an heir coming in according to the principles expounded by them. Nor is it the view of Dr. (now Mr. Justice) GURUDAS BANARJI, as shown in the passage from his Tagore Lectures, pp. 375—7; see also S. C. Sarkar's *Vyavastha Chandrika*, Vol. II, p. 521, to which the Advocate-General drew our attention—a passage which is in substance, and in some parts almost in identical words, adopted by Mr. J. S. Siromani in his *Commentary on Hindu Law*, p. 396. And when we look at the *Vivada Tandava* itself, the reason of the omission on which Mr. Bhandarkar has founded his argument becomes quite clear. The author has dealt with the rights of the offspring of the rival wife, not under the exposition of the words 'husband's *sapindas*,' but in the earlier portion dealing with the woman's own offspring. He there actually cites the text of Manu, IX, 183, already quoted, and naturally, from that point of view, treats of the rival wife's children immediately after he has dealt with the rights of the woman's own offspring. And the author of the *Madana Parijata*,* (who is also the author of the famous commentary on the *Mitakshara* named the *Subodhini*), treats the subject in the same manner [see p. 667 (Bibl. Ind. Ed.)].

The net result of the whole discussion, therefore, appears to be this—that, assuming the true construction of the *Mitakshara* to be such as the *Vyavahara Mayuka* propounds, and assuming, consequently, that the nearest *sapindas* to whom the property of a childless woman should go, are the nearest *sapindas* not of the husband, but those of the woman herself, in the husband's family, there can still be no doubt that the grandson of a rival wife belongs to the class so designated; that, according to the views of some writers, he comes in next after the offspring of the woman herself, and before her husband; and that, according to the view of others, he would come in after the husband, but [122] before his other wives, and such other wives' daughters, and of course before other more distant heirs including the husband's brother's son. It was said, however, that as the inheritance goes to those nearest to the woman whose property is in question in her husband's family, we should not accept the order in which heirs succeed to the husband, because that order is not based on nearness of relationship, which is what nearness must be held to signify for the purpose of the rule under consideration. The arguments urged in support of this contention are those stated by West and Buhler, and are, in their opinion, outweighed by the argument derived from that "identity of the wife with her husband," which they justly call "a leading principle of the *Mitakshara*," and which may even be called a leading principle of the whole of the Hindu law. The opinion expressed by West and Buhler is concurred in by Dr. Banarji, p. 377, in his Tagore Lectures, and also by Mr. J. S. Siromani†, and appears to me to be worthy of acceptance. And I may also add, that, even if we rejected the guidance afforded by the principle of the identity of husband and wife, it would, in my view, be difficult to justify any application of the principle of nearness of relationship which would make either the rival widow or the husband's brother's son a nearer relation than the husband's own son's son.

But Mr. Bhandarkar has raised a further point. He cites the text of Brihaspati‡, which is quoted in the *Vyavahara Mayu*-[123]kha, and from that

* See about him Stokes' *Hindu Law Books*, p. 177; and Mandlik's *Hindu Law Introduction*, pp. ix, lxiv, lxvii, lxxii.

† *Commentary on Hindu Law*, p. 396, see also S. C. Sarkar's *Vyavastha Chandrika*, Vol. II, p. 522.

‡ See with regard to that text the notes at Stokes' *Hindu Law Books*, p. 106, and also BANARJI'S Tagore Lectures, p. 133. That text also forms the subject of some remarks in the late Professor Goldstucker's paper on the deficiencies in the administration of Hindu Law

text asks the Court to draw the conclusion that the husband's brother's son takes precedence over the other relatives of the husband, and the relatives of the widow in the husband's family such as the plaintiff. It is, however, to be remarked that that text is nowhere cited in the Mitakshara, and the rule stated by Vijnaneshwara is not consistent with it. In truth, even the rule which Nilakantha himself deduces from Yajnavalkya's general text is not in harmony with the enumeration of heirs contained in the text of Brihaspati now under consideration. And yet the Mayukha does not say how the two are to be made to stand together. The learned authors of the Digest have placed the heirs enumerated by Brihaspati after the husband, and before the woman's *sapindas* in her husband's family. This certainly appears to be warranted by the express words of the Mayukha contained in placitum 30, Stokes, p. 106. Yet it is not quite reconcilable with the previous declaration in placitum 28, that "if there be no husband, then the nearest to her in his family takes" the woman's property. It is quite plain that some of the persons referred to in Brihaspati's text do not answer to this description at all: while of those that do, the husband's brother's son is not obviously nearer than the husband's younger brother, and yet according to Brihaspati's text the former would stand before the latter.* It cannot, therefore, be assumed to be quite clear, according to the view of the Mayukha*, that Brihaspati's list states the true order of succession as between the heirs enumerated, or that all those heirs take precedence over the ones included under the designation "nearest to her in her husband's family." Mr. J. S. Siromani indeed, in his Commentary on Hindu Law, says (p. 389): "Taking all that the author says in the chapter into consideration, it seems that in the above list the relatives on the father's side succeed in the case of a woman married in the disapproved forms of marriage; and in the case of a woman married in any of the approved forms of marriage, the inheritance goes to the relatives [124] on the side of the husband in the above list." But he himself adds, that "this point again is not free from doubt." And, besides, it is to be remarked, that it is not easy to provide for the son-in-law, in a distribution made on the principle here indicated.

Mr. Bhandarkar in the course of his reply referred us to the case of *Bachha v. Jugmon*, I. L. R., 19 Cal., 355, in which the Court discusses some of the questions arising with reference to this text of Brihaspati. The Court there was "inclined to think that what the author perhaps meant to lay down was that the succession of the heirs mentioned in Brihaspati's text is to be taken subject to the rule of law laid down by him in accordance with the Mitakshara (see Shama Churn's Vyavastha Chandrika, Vol. II, pp. 537-8)." If so, the text fails to support Mr. Bhandarkar's argument. The judgment in a previous passage had said that "on a careful consideration of the Vyavahara Mayukha itself (Ch. IV, sec. 10, pl. 22-8), it seems to be doubtful whether the author really meant" the "succession to be regulated in the order in which the said heirs are enumerated" in Brihaspati's text. If that view is correct, and it seems

(see Goldstucker's Remains, Vol. II, p. 157). The translation given by Professor Goldstucker, it will be noticed, does not agree with those given by Borradaile or Rao Sahab Maudlik. Probably, no doubt, Professor Goldstucker when translating the passage as quoted in the Daya Bhaga (see Stokes' Hindu Law Books, p. 257), would accept Jimuta Vahana's exposition of it, almost as a matter of course. The Vramitrodaya's interpretation, which agrees with Jimuta Vahana's, is referred to further on. That work emphatically declares that it "would be contrary to immemorial custom," if the sister's son and the rest were allowed to be heirs, although the son of a co-wife was living (p. 243); see also Burnell's Varadaraja, p. 511, and Vyavastha Chandrika, p. 539.

Mr. Justice BANARJI rather inclines to the contrary opinion. He also points out (p. 386) that the Bengal lawyers consider the text merely as generally laying down the right to inherit, not the order of succession; (see, too, pp. 428-433).

to be identical with that which has just been set out from Mr. J. S. Siromani's work, the result is nearly the same as it is on the construction of that text which prevails in the Bengal school as laid down by Dr. BANARJI (see Lectures, pp. 386, 428-433), and does not help the appellants before us. But Mr. Bhandarkar argued that the heirs specifically named in Brihaspati's text ought to be given precedence over those who come in under the general designation, each group of them taking precedence in the class (*viz.*, that of husband's kinsmen or parents' kinsmen) to which it belonged. There is, however, no authority for this view. In West and Buhler's Digest the precedence is given to the whole of the enumerated heirs, and the ground for such precedence has already been stated. If they are not treated as one class, there is apparently no other ground for the preference than is indicated by the principle mentioned in the Vyavahara Mayukha, Chapter IV, section VIII, placitum 18. But that principle as there expressed appears to be intended to apply only where there is a "compact [126] series." This Court in *Mohandas v. Krishnabai*, I. L. R. 5 Bom., 597, declined to apply it in the case of *bandhus*, so as to give to the *bandhus* expressly named a preference over those who come in under the general definition. I think this is the authority which would be more applicable in the matter before us, and no such preference of the designated persons can, therefore, be allowed in this case.

It is to be remarked also that the text under consideration, in order to be accurately applied, has to be restricted by limitations which are not stated in it. Nilakantha supplies one restriction, which may be accepted as implied in the provisions of the text itself. But when he, by adding another similar restriction, postpones these enumerated heirs to the husband and the parents, he has no warrant for so doing in what is expressed, or even in what is implied in that text. There is thus a good deal of difficulty in the practical application of the passage of the Mayukha which Mr. Bhandarkar has relied upon. A further point is suggested by the mode in which the Viramitrodaya deals with this text of Brihaspati. According to the interpretation there given, the grandson of the rival wife is actually specified as an heir in this very text. It is not necessary to examine the process by which this result is reached. The result itself, however, is thus clearly stated by Mitra Misra, after setting forth his exegetical gloss on Brihaspati's text. "Hence on failure of heirs down to the daughter's son, first the *aurasa* inherits, after him his sons and grandsons In their default, the son of a rival wife, her son and grandson (become heirs in their order); by reason of their being, under the circumstances, the givers of the *pinḍa* and the liquidators of the debts, by reason of the text of Manu cited above." It seems [126] to me probable that Nilakantha did not understand the text in the same manner as Mitra Misra. But as he merely sets out the text without any gloss on its terms, it is not possible to give a very confident opinion on this point.

Besides the difficulties above glanced at, it is worthy of remark, that this particular passage in the Mayukha, and the text of Brihaspati on which it is based, do not, as far as I have been able to see, appear to have been anywhere

* Mr. Justice BANARJI speaks of the "order of succession" in the Viramitrodaya and the Mayukha and Smṛiti Chandrika being the same (Tagore Lectures, p. 374), *see quare*. The translator of the Smṛiti Chandrika (p. 135) refers to Brihaspati's text as translated at II Colebrooke's Digest, p. 621. That translation agrees in all important respects with the translation in Mr. Justice BANARJI's Lectures, pp. 373-4, and both are based on Mitra Misra's and other writers' interpretation of the text, not "on additions not borne out by the Sanskrit text" as Mr. Krishna Swami Iyer supposed. As to the Smṛiti Chandrika itself, on which Mr. Bhandarkar relied, see Vyavastha Chandrika, pp. 541-2; and *Wooma Daee v. Gokoolanund Dass*, I. L. R., 3 Cal., 594.

relied upon in any of the *responsa prudentum* collected in West and Bühler's Digest, (cf. as to this *Lallubhai v. Mankuwarbai*, I. L. R., 2 Bom., 419). The son-in-law who comes in under this passage, and who could hardly come in under the other rules, and whose case, therefore, would afford a crucial test on this point, has no place in the list of *sapindas* whose cases are enumerated in West and Bühler. But whatever may be the proper conclusion to be derived from a consideration of the various circumstances now dwelt upon, and whatever may be the rule which ought to be applied in cases where the Mayukha is the governing authority, it seems to me that in dealing with this case, coming from a district in which the Mitakshara is the paramount authority, we are not bound to apply this exceptional and anomalous rule of the Mayukha and more especially so because that rule forms part of a scheme of succession to *stridhan*, which in most important particulars is entirely different from the scheme of the Mitakshara. According to this latter scheme, as already shown, the plaintiff is a nearer *sapinda* of Anandibai and her husband than either Kamaljabai or Tulajirav, and, therefore, the defendants cannot avail themselves of any *ius tertii* to resist the claim of the plaintiff to Anandibai's property. That claim has been properly allowed by the Subordinate Judge, and his decree must be confirmed with costs.

Jardine, J. :—The question of Hindu law which was argued before us has been dealt with by my brother TELANG in an exhaustive judgment in which I concur. I now proceed to give the decision of the Court on the questions of fact, of which two were argued. (His Lordship then discussed the facts of the case, which are not material to this report.)

NOTES.

[1. The husband's heirs are the heirs to the *stridhana* of a childless widow who had been married in an approved form :—(1906) 30 Bom., 431 P.C., where Brihaspati's text was explained; (1908) 30 Bom., 607; (1908) 5 Bom. L. R., 17, (1908) 5 Bom. L. R., 244; (1897) 25 Cal., 354; (1916) 20 C.W.N., 489. In (1911) 36 Bom., 339 F.R.; 14 Bom. L. R., 89 it was pointed out that the several rules regarding *stridhana* succession according to the form of marriage should be so understood as to mean the nearest relations of the propositus but through the husband or the father respectively, whether under the Mitakshara or the Mayukha.

2. The presumption in the absence of evidence to the contrary as to the form of marriage whether among the *Dwijas* or the *Sudras* is that it was celebrated according to Brahma rites :—(1909) 32 Mad., 512; (1897) 25 Cal., 354; (1910) 12 Bom. L. R., 545; (1909) 6 N.L.R., 103.]

[127] CRIMINAL REVISION.

The 8th April, 1892.

PRESENT :

MR. JUSTICE BIRDWOOD AND MR. JUSTICE PARSONS.

Queen-Empress

versus

Babaji.

Penal Code (Act XLV of 1860), Sec. 500—Defamation—Statement by a witness—Privileged.

A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding.

Criminal Revision, No. 138 of 1891.

* THE accused was examined as a witness in a suit pending in the Mamlatdar's Court. In his deposition he stated that the complainant had once been convicted of an offence by a Criminal Court.

For this statement the complainant prosecuted the accused on a charge of defamation, under section 500 of the Indian Penal Code, before a Bench of Magistrates at Poona.

The accused was convicted of defamation, and sentenced to pay a fine of Rs. 15, or, in default, to suffer simple imprisonment for fifteen days.

* The High Court sent, for the record and proceedings of this case in the exercise of its revisional jurisdiction.

There was no appearance for the Crown, or for the Accused.

The judgment of the Court (Birdwood and Parsons, JJ.) was as follows :—

In *Baboo Gunnesh Dutt v. Mugneram*, 11 B. L. R. (P. C.), 321, the Privy Council decided that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. The judgment in that case contains the following observations :—

" Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public, and the administration of justice, that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by [128] suits for damages; but that the only penalty they should incur, if they give evidence falsely, should be an indictment for perjury."

With reference to this judgment Mr. Justice SHEPHERD observed in *Manjaya v. Shesha Shetti*, 1. L. R., 11 Mad., 477, that public policy must not less require that witnesses should not be exposed to the fear of prosecution, except the prosecution for perjury. And the learned Chief Justice of the Madras High Court applied in that case, (which, like the present, was one where a witness was prosecuted for defamation in respect of a statement made by him when giving evidence in a judicial proceeding), the observations of COCKBURN, C.J., in *Scaman v. Netherclift*, 2 C. P. D., 53, and of FIELD, J., in *Goffin v. Donnelly*, 6 Q. B. D., 307, as to the rules of public policy which subordinated the interest of the individual to that of a higher interest, viz., public justice. With reference to the case of *Hinde v. Baudry*, 1. L. R., 2 Mad., 13, Sir ARTHUR COLLINS remarked :—

" The Judges there said that the principle of public policy guards the statements of a witness against an action, whether the statements are malicious or not. I think the same observation will apply if the criminal law is set in motion and proceedings are taken under section 500 of the Indian Penal Code. If the petitioner gave false evidence, he can be punished for that offence. I, therefore, hold that the petitioner was wrongfully convicted of defamation."

Following this ruling, and having regard also to *Dawan Singh v. Mahip Singh*, 1. L. R., 10 All., 425, and *Bhikumber Singh v. Becharam Sircar*, 1. L. R., 15 Cal., 264, we reverse the conviction and sentence, and acquit the accused of the offence of defamation of which he has been convicted, and we direct that the fine, if paid, be refunded to him.

NOTES.

[On grounds of public policy, there extends, in respect of defamation, absolute privilege from civil proceedings, (1872) 11 B. L. R., 321 P. C.; (1900) 25 Bom., 230, and from criminal proceedings also, according to the Bombay and Madras decisions, to persons connected with judicial proceedings whether as Judge, 17 Mad., 87; or Counsel, 10 Mad., 25;

(1908) 19 M.L.J., 217; 2 Bom. L. R., 3; (1894) 19 Bom., 340; see, however, (1907) 9 Bom. L.R., 1287; on party, (1906) 30 Mad., 222 [see, also, (1912) 23 M.L.J., 50 where the Registrar was not treated as a Court]; or complainant, (1912) 37 M.L.J., 110; 11 M.L.T., 431 [see, also, (1891) 19 Bom., 51 where the enquiry was not treated as judicial proceedings]; or accused (1908) 31 Mad., 400; (1912) 36 Mad., 216; 23 M.L.J., 39 F.B., or witness, (1892) 17 Bom., 127; (1893) 17 Bom., 573.

The Calcutta and the Allahabad High Courts and the Punjab and the Sindh Chief Courts, however, judge the question solely by reference to the Indian Penal Code as regards criminal proceedings, thus recognising only a qualified privilege:—(1913) 17 C.W.N., 297; see also (1914) 41 Cal., 514—(counsel); (1909) 36 Cal., 375; (counsel); (1905) 32 Cal. 756 (witness); (1899) 27 Cal., 262 (witness); (1903) 8 C.W.N., 292; (in affidavit); (1903) 13 C.W.N., 1087 (accused); (1913) 17 C.W.N., 449; (1907) 29 All., 685 (witness); (1912) P.L.J., 244; 15 I. C., 494 (witness); (1911) 5 S.L.R., 133; 13 I. C., 217 (party).]

[129] ORIGINAL CIVIL

The 15th July, 1892.

PRESENT:

MR. JUSTICE BAYLEY (ACTING CHIEF JUSTICE), AND MR. JUSTICE FARRAN.

J. G. Smith and others..... Plaintiffs

versus

Ludha Ghella Damodar.....Defendant.

Contract—Construction—Custom or usage qualifying contract—Evidence—Evidence Act I of 1872, Sec. 92, proviso 5—Shipment, meaning of—Arbitration—Appointment of umpire by arbitrators—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire.

On 18th April 1890, the defendant signed a contract (No. 3053) to buy from the plaintiffs 25 bales grey dhoties "June shipment, in four lots, with an interval of four weeks." These goods were not supplied, as they could not be obtained at the price limited. On 24th September 1890, the defendant gave the plaintiffs an order at an increased limit of price in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1d. per pair on original limits for November, December, January shipments, in three monthly lots, about 8 bales to be shipped in each month." This order was accepted and the goods were shipped as follows:—6 bales were handed to the carriers (the S. & N. W. Railway Co.) in Manchester on the 28th November 1890, and were shipped at Birkenhead on the 9th December 1890; 6 bales were handed to the same carriers on the 9th December 1890, and were shipped on the 13th December 1890; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped on the 6th January 1891. The defendant refused to accept the goods. He contended that the documents of 18th April and 24th September should be read together, and that the final contract was for November, December, January shipments, in three monthly lots, at intervals of four weeks. He also contended that the shipment on the 9th December 1890, was a late shipment, and that he was not, therefore, bound to accept the goods under the contract. As to this last contention the plaintiffs alleged that by the custom of Bombay in the case of contracts made with members of the Native Piece-goods Association the date of the carrier's weight note was to be regarded as the date of shipment, and that, under such a contract as the one in question, delivery to the Railway Company or other inland carrier was equivalent to shipment. This custom, it was alleged, originated in consequence of the above Association having agreed that all piece-

* Small Cause Court Suit, No. 25439 of 1891. .

goods ordered out by its members should be conveyed to Bombay by certain lines of steamers only and by no others. It was stated that, unless some such custom existed, it would in many instances be impossible for Bombay merchants to carry out their contracts, as no steamers of the selected lines might be available. The Judge of the Court of Small Causes at the hearing found that the alleged custom existed, and was generally accepted and understood by merchants and dealers in Bombay. On reference to the High Court,

[130] *Held*—

(1) that the contract finally agreed on was that 25 bales relating to No. 3053, (i.e. the document of the 18th April) should be purchased on defendant's account at an all round advance of 1d. per pair on the original limits. Such bales to be shipped in the manner and at the times mentioned in the document of the 24th September 1890;

(2) that evidence of the alleged custom or usage of trade was not admissible under section 92, proviso (b), of the Evidence Act (I of 1872) to explain or vary the natural and ordinary meaning of the words in the contract. The parties contracted for a shipment on board of a ship or steamer, and to allow evidence of a usage that delivery to a Railway Company at an inland town should be regarded as equivalent to shipment on board a vessel at a seaport town would be to allow evidence of a usage repugnant to, or inconsistent with, the express terms of the contract.

The contract in question provided that disputes between the parties were to be referred to the arbitration of two merchants, and that should the arbitrators be unable to agree they should appoint an umpire. The plaintiffs and defendant referred their dispute to two arbitrators. These arbitrators disagreed in their report, and referred the case to the Bombay Chamber of Commerce for the appointment of an umpire. The Chamber of Commerce appointed an umpire, who made his award.

Held, that the appointment of the umpire was invalid. The arbitrators could not delegate the power of appointment conferred on them by the contract.

CASE noted for the opinion of the High Court by C. W. Chitty, Chief Judge, of the Small Cause Court, Bombay, under section (3) of the Presidency Small Cause Court Act, XV of 1882.

The case was stated as follows:—

1. In this case the plaintiffs sue to recover Rs. 2,000, part of a sum of Rs. 2,112-1-3, as damages sustained by them in consequence of the defendant's failure to take delivery of, and pay for, 25 bales grey dhoties which he had agreed to purchase from the plaintiffs.

2. The contract with the plaintiffs was admitted by the defendant, though question was raised as to the proper construction to be put upon it. On the 18th April 1890, the defendant signed a contract (No. 3053) on the printed form of the plaintiffs' office for the purchase of 25 bales grey dhoties, "June shipment, in four lots, with an interval of four weeks." The goods could not be obtained at the defendant's limits, and so were not supplied. On the 24th September 1890, the defendant gave to the [131] plaintiffs an order, at an increased limit, in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1d. per pair on original limits for November, December, January shipment, in three monthly lots, about 8 bales to be shipped in each month. Reply in 10 days."

3. The last mentioned order was accepted, and the goods supplied and shipped as follows:—6 bales were handed to the carriers (the S. & N. W. R. Company) in Manchester on the 28th November 1890, and shipped at Birkenhead on the 9th December 1890, per S. S. "Clan Graham"; 6 bales were handed to the same carriers on the 4th December 1890, and shipped per S. S. "Branksome Hall," on the 13th December 1890; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped per S. S. "Werneth Hall" on the 6th January 1891.

4. The defendant contended that the documents of the 18th April and 24th September must be read together, and that the final contract was for November, December and January shipments, in three monthly lots, at interval of four weeks. This can hardly have been intended, the two arrangements being inconsistent and incapable of being taken as one; e.g., if goods were shipped on 1st November, (which would satisfy the term "November shipment"), the next shipment would have to be made on the 29th November, and not in December at all, and the third in December and not in January. It was further contended on behalf of the defendant that the shipment per S. S. "Clan Graham" was a late shipment, and that, consequently, the defendant was not bound to accept the goods under the contract.

The question whether the said shipment was late or not depends on the further question, whether or not by the custom of Bombay, in the case of piece-goods ordered out by members of the Native Piece-goods Association and shipped by one of the Conference steamers, the date of the carrier's weight note must be regarded as the date of the shipment. This was the main point in issue in the case, and my finding on it is given in the following paragraphs.

[132] 5. It was proved before me that some six years ago the Native Piece-goods Association took for the first time to arranging their own freight contracts, and by an agreement with four lines of steamers, (which has since been renewed from time to time as required), they agreed that all piece-goods ordered out by members of the association should be conveyed to Bombay by steamers of those four lines only and no others. It was after, and in consequence of, this action on the part of the piece-goods dealers that the alleged custom arose. The reason for it is obvious, as, unless some such custom existed, or express provision were made to meet the case, it would in many instances be impossible for merchants in Bombay to carry out their contracts. Goods, for instance, ordered for a January shipment might be sent to Birkenhead early in the month, and, because no Conference steamer was ready before the 31st, might be detained in Birkenhead until February, and so the contract would not be complied with. To meet this difficulty it is alleged that it has, for the last six years or thereabouts, been the custom to treat the date of the carrier's weight notes in Manchester as the date of shipment for the purposes of carrying out such contracts. As to the existence of such a custom, a large body of evidence was given before me by gentlemen, partners or assistants of trading firms in Bombay. Their testimony was unanimous as to such custom obtaining in Bombay; while, on the other hand, not a single witness was called on the part of the defendant to disprove it. Of course, the onus lies on the plaintiffs to prove a custom on which they rely; but it seems curious that, if no such custom existed, ample testimony should not be found to meet that given on the plaintiffs' behalf.

6. It was contended for the defendant that no specific instances could be shown where such custom had been objected to and had been forced on an unwilling party. Though, no doubt, such evidence would be valuable, I did not consider it absolutely essential. If it were a custom which in itself was so reasonable and universally accepted that no one had ever disputed, it could never be proved in a Court of law. At the same time almost all the witnesses stated that complaints had been made in their office by dealers on account of late shipments, but that the dates of the carrier's weight notes were always accepted by such [133] dealers as equivalent to the date of shipment. Then, again, it was contended that the fact that some firms insert a clause in their contracts expressly stipulating that the date of the carrier's weight notes should count as the date of shipment showed that no such general custom existed. The evidence before me,

however, went to show that such a practice was by no means universal, and that when inserted, it was so inserted *ex majore cautela*, and not in any way from ignorance of, or disregard for, the general custom. On the evidence, therefore, before me I am clearly of opinion that the custom, as alleged, does exist and has existed for some years past, and been generally accepted and understood by both merchants and dealers in Bombay.

7. It was contended on behalf of the defendant by his counsel, (but not till he commenced to open his case), that evidence of such a custom was inadmissible under section 92 of the Evidence Act. The objection was taken, it is true, by the pleader for the defendant during the examination *de bene esse* of one of the plaintiffs' witnesses on the 14th January 1892, but was not then pressed, and was never taken during the hearing of the plaintiffs' case. It cannot, I think, be successfully maintained, and if not, it follows that the first shipment by S. S. "Clan Graham" was in time, and that the defendant was not justified in refusing the goods.

8. The goods on arrival in Bombay were tendered to the defendant in the usual course, and he refused to accept them on the ground of late shipment. Much correspondence ensued, the plaintiffs insisting on an arbitration in terms of their contract. The goods were, in fact surveyed *ex parte* by Mr. Black on behalf of the plaintiffs, but the plaintiffs afterwards consented to cancel that report, and the matters in dispute—i.e., defective quality and late shipment—were referred to two arbitrators, Mr. O. Schilizzo for the plaintiffs and Mr. Purshotam Kuverji for the defendant. On the 4th of August 1891, after these gentlemen had held their survey, but before they made their report, the defendant wrote, saying the notice for arbitration was too short; that contrary to arrangement Mr. Black's report had been shown to the arbitrators, and that he repudiated the arbitration proceed-~~ings~~ [134] ings. There is, I may mention, no evidence of any such arrangement as alleged. On the 5th August 1891, the arbitrators published their report, but as they disagreed they referred it to the Chamber of Commerce, in the usual way, to appoint an umpire. Mr. J. S. Symons, of Finlay, Muir & Co., was accordingly appointed, and after survey reported that the goods were a fair tender against the contract; that the dates of the carrier's notes must be taken as the dates of shipment, and that the slight irregularity must be met by the adjustment proposed in plaintiffs' letter of the 27th April 1891, i.e., to allow interest and exchange on the shipment as of intervals of 30 days. It was proved before me that the defendant would not be in any way prejudiced by the third shipment being made too early; especially if, as suggested by Mr. Symons, an allowance was made to him in terms of the plaintiffs' letter of 27th April 1891, in respect of interest and exchange.

9. The defendant declined to be bound by the said award, and the plaintiffs accordingly filed this suit.

10. As to the amount of damages there was practically no dispute raised before me. It also appeared that, if the calculation were made on the basis suggested by the said letter of 27th April 1891, and Mr. Symons' award owing to the difference of exchange, the result would be to slightly increase the sum due to the plaintiffs, and it would not, therefore, affect the amount of their claim in this suit, which cannot exceed Rs. 2,000.

11. The defendant's counsel requested me to state a case for the opinion of their Lordships on the questions of law arising in the case. In accordance with the practice, of late adopted by Mr. Hart, I set out the questions submitted on behalf of the defendant, which are as follows:—

(1) What is the proper construction of the two documents of the 18th April and the 24th September 1890?

(2) Did the plaintiffs carry out the contract by shipping goods on the 9th and 13th December and 6th January 1891?

(3) Is evidence admissible to prove that the words 'shipment' and 'to be shipped' have any other meaning than their plain, ordinary and accepted meaning?

[135] (4) If so, has the mercantile usage in Bombay--under which plaintiffs contend that, in contracts for Manchester goods, shipment means and includes delivery to carrier at Manchester--been proved in absence of proof of specific instances?

(5) If the first shipment was not in time under the contract, was defendant bound to take delivery of the two later shipments?

(6) If evidence of the custom was admissible, and the date of the carrier's weight note is to be taken as the date of shipment, was defendant bound to take delivery of the third shipment, those goods being admittedly delivered to the carrier on 23rd and 24th December 1890?

(7) Does the arbitration clause in the contract preclude defendant from setting up any legal defences he may have to the action?

(8) Was the reference made by the arbitrators of the matters in dispute to the Chamber of Commerce within the terms of the arbitration clause?

(9) Is the defendant bound by the award made by Mr. Symons?

(10) Had not the defendant the right to withdraw from arbitration any time before award, and if so, did not his attorney's letter of 4th August 1891, operate as a withdrawal?

(11) Whether, the plaintiffs not having filed this suit on the award, the parties are not relegated to their legal rights under the contract?

12. Some of these questions appear to me to be open to objection, and they do not state exactly the points requiring decision. The first must be regarded only so far as it deals with the dates and mode of shipment. The second deals with a question of fact depending on my finding on the above-mentioned custom. The third was taken late, but is open to no objection. The fourth is a question of fact. The answer to the fifth is too obvious to require remark. The last five deal with the question of arbitration. With regard to that it may be mentioned that the defendant by his letter of the 4th August 1891, declined to be bound by the award, and also that, though the contract provided [136] for the umpire to be chosen by the arbitrators, he was, in fact, chosen by the Chamber of Commerce, to whom the arbitrators referred the matter in the usual course for that purpose.

13. The questions of law arising on the above facts, and requiring decision, seem to me to be as follows:—

(1) What is the proper construction of the two documents of the 18th April 1890, and 24th September 1890, especially with regard to the time and mode of shipment?

(2) Is evidence admissible to prove that the words "shipment" and "to be shipped" have any other meaning than their plain, ordinary and accepted meaning?

(3) If such evidence is admissible, and the date of the carrier's weight note is to count as the date of shipment, was defendant bound to take delivery of the third shipment, the goods being admittedly delivered to the carriers on the 23rd and 24th December 1890?

(4) Is the defendant bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire, or having regard to defendant's contention in his letter of the 4th August 1891?

(5) Are the plaintiffs precluded from relying on such award, because their particulars of claim were not calculated on the basis of award?

14. I have reserved judgment in this case until the decision of their Lordships on the above questions has been received.

Rivett-Carnac for Defendant:—Shipment means placing on board ship, not delivering to the carrier. He cited *Bowes v. Shand*, 2 Ap. Ca., 455; Contract Act (IX of 1872), section 28, exception 1.

Scott, for Plaintiffs, *contra*:—He cited Specific Relief Act (I of 1877), section 21; Contract Act (IX of 1872); *Re Rouse and Meier*, L. R., 6 C. P., 212; *Koegler v. The Coringa Oil Co.*, 1 L. R., 1 Cal., 42; *Re Hopper*, L. R., 2 Q. B., 367; *Ireland v. Livingstone*, 5 Eng. and Ir. App., 395; Benjamin on Sales, (4th Ed.), p. 578; [137] *Spicer v. Cooper*, 1 Q. B. 424; Smith's Leading Cases (9th Ed.), Vol. 1, p. 589; *Simpson v. Crippin*, L. R., 8 Q. B., 14; *Brandt v. Lawrence*, 1 Q. B. D., 344.

Bayley. C. J.:—Upon this reference under section 69 of the Presidency Small Cause Courts Act (XV of 1882) the first question to be considered is what is the proper construction of two documents, dated the 18th April 1890, and 24th September 1890, by which the defendant agreed to purchase 25 bales of grey dhoties, and which on their arrival in Bombay the defendant refused to take delivery of, and pay for.

On the 18th April 1890, the defendant signed a contract, No. 3053, on the printed form of the plaintiffs' office for the purchase of 25 bales grey dhoties "June shipment, in four lots, with an interval of four weeks." It is stated in the case that the goods could not be obtained at the defendant's limits, and so were not supplied. On the 24th September 1890, the defendant gave to the plaintiffs an order, at an increased limit, in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1d. per pair on original limits for November, December, January shipment, in three monthly lots, about 8 bales to be shipped in each month." In the original document of the 24th September 1890, which was handed to us during the argument, the word "each" in that sentence is underlined.

The last mentioned order was accepted, and the goods were supplied and shipped as follows:—6 bales were banded to the carriers (the S. & N.-W. Railway Company) in Manchester on the 28th November 1890, and shipped at Birkenhead, on the 9th December following, per S. S. "Clan Graham"; 8 bales were handed to the said carriers on the 4th December 1890, and shipped per S. S. "Branksome Hall" on the 13th of that month; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped per S. S. "Werneth Hall" on the 6th January 1891.

The case stated that the defendant contended that the documents of the 18th April and 24th September must be read to-[138] gether, and that the

[Sec. 28:—Every agreement, by which any party thereto is, restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1.—This section shall not render illegal a contract, by which two or more persons agree that any dispute, which may arise between them in respect of any subject or class of subjects, shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

When such a contract has been made, a suit may be brought for its specific performance; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.]

the final contract was for November, December and January shipments, in three monthly lots, at intervals of four weeks.

I think that such contention is quite untenable. The provision as to the interval of four weeks referred solely to the contemplated June shipment mentioned in the first document, the goods for which could not be obtained at the defendant's limits, and so were not supplied. The times and mode of shipment of the 25 bales were those specified in the document of the 24th September, viz., for November, December and January shipment, in three monthly lots, about 8 bales to be supplied in each month. The second document refers to the previous one, and the contract finally agreed on was to purchase, on defendant's account, 25 bales relating to No. 3053 (i. e., the document of the 18th April) at an all round advance of 1*l.* per pair on the original limits, such bales to be shipped in the manner and at the times mentioned in the document of the 24th September.

It was stated in the House of Lords, in *Bowes v. Shand*, 2 Ap. Ca., 455 at p. 462, to be perfectly well settled that the construction of a contract, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, is for the Court, i. e., as distinct from the jury.

Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time specified in the contract, and it has been held by the highest authority that it is a condition precedent that the goods shall be so shipped, the time of shipment forming part of the description of the goods. Some difficulty has been found in the interpretation of the expression "to be shipped," or "shipment," within a certain time. But it was finally settled, in the case just cited, that such expressions mean that the goods shall be placed on board ship during the time specified, according to the natural meaning of the words, in the absence of any trade usage to alter that meaning.

This view was arrived at in *Bowes v. Chand*, 2 Ap. Ca., 455 at p. 462, in 1877, but not till after very eminent Judges had previously come to a [139] different conclusion as to the correct construction of the contract in dispute in that case. The two contracts there were made, in London for the sale of 600 tons of rice (each for the sale of 300 tons of rice) to be supplied at Madras or Coast during the months of March ^{and} or April 1874, per "Rajah of Cochin." All the rice had been put on board, and bills of lading given for it in February, except as to 4 tons of rice, which were put on board in March. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March ^{and} or April. The House of Lords reversing

the judgment of the Court of Appeal (reported at 2 Q. B. D., 112) held that the contract had not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given, the plaintiffs could not recover on the contract.

In the present case it was contended by the defendant that the shipment of the first of the three monthly lots per S. S. "Clan Graham" at Birkenhead on the 9th December 1890, was a late shipment, not having been shipped in November, and that, consequently, he was not bound to accept the goods under the contract.

The plaintiffs met, or endeavoured to meet, that objection by alleging and calling evidence to prove that for the last six years, or thereabout, it had been the custom in Bombay, in the case of piece-goods ordered out by members

of the Native Piece-goods Association (to which, as admitted during the argument before us, the defendant belonged) and shipped by one of the Conference steamers, to treat the date of the carrier's weight notes in Manchester as the date of shipment for purposes of carrying out such contracts. The Chief Judge states that a large body of evidence was given before him by gentlemen, partners or assistants of trading firms in Bombay, and that their testimony was unanimous as to such custom obtaining in Bombay; while, on the other hand, not a single witness had been called on the part of the defendant to disprove it. The Chief Judge, on the evidence before [140] him, was clearly of opinion that the custom as alleged did exist, and had existed for some years past, and been generally accepted and understood by both merchants and dealers in Bombay.

I am clearly of opinion that evidence of such a custom, or usage of trade, is not admissible to explain or vary the natural and ordinary meaning of the words in the contract in the present case.

By section 92, proviso (5),* of the Indian Evidence Act (1 of 1872) 'any usage or custom, by which incidents not necessarily mentioned in any contract are usually annexed to contracts of that description, may be proved, provided that the annexing of such incidents would not be repugnant to, or inconsistent with, the express terms of the contract.'

As already noticed, the document of the 24th September refers to the one of the 18th April, and by one of the clauses of the printed portion of the document of the 18th April "all goods, except metals, are to be shipped per steamers in accordance with indenter's freight contracts." I think that by 'shipment' in the document of the 24th September is meant the same as "to be shipped per steamers" in the earlier document. The parties had, in my opinion, contracted for shipment on board of a ship or steamer, and to ask that delivery to the Railway Company at an inland town may be treated as equivalent to shipment on board a vessel at a sea-port town is, in my opinion, 'repugnant to, or inconsistent with, the express terms of the contract,' and that evidence of any such custom or usage of trade is, in a contract like the present, clearly inadmissible.

Reference was made during the argument in this Court to section 98 of the Evidence Act, which states that 'evidence may be given to show the meaning of * * * local and provincial expressions * * * and of words used in a peculiar sense.'

The evidence in the present case does not, from the statement of it by the Chief Judge, appear to have been given for the purpose of showing that the word 'shipment' was 'used in a peculiar sense,' but to prove a custom to treat the date of the carriers' weight notes in Manchester as the date of shipment at Birken-[141]head or Liverpool for purposes of carrying out such contracts as the present one.

The defendant here, a Hindu, had stipulated, by a document written in the English language, for shipment in three monthly lots in three specified

*[Sec. 92:—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a

document, have been proved according to the last section, no

oral agreement. evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

months, and to such he was entitled. As stated by the Lord CHANCELLOR (Lord CAIRNS) in *Bowes v. Chand*, 2 Ap. Ca., at p. 463, 'it is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance. * * *?'

The portions of the Indian Evidence Act which I have quoted merely reproduce the English law on the subject; the Act itself, to use the language of Sir James F. Stephen, who framed it, being 'little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India' (Introduction to the Indian Evidence Act, p. 2.)

The next point for consideration is that raised in the fourth question put by the Chief Judge, viz., is the defendant bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire, or having regard to defendant's contention in his letter of the 1th August 1891?

In the document of the 18th April it is provided that disputes of whatever nature are to be referred to the arbitration of two merchants, and that, should the arbitrators be unable to agree, they shall appoint an umpire.

The arbitrators published their report, but as they disagreed they referred it to the Chamber of Commerce (the Chief Judge states 'in the usual way') to appoint an umpire. Mr. Symons was accordingly appointed and made his award.

I think that such appointment was clearly bad. By the document of the 18th April one of each of the two merchants who were to act as arbitrators was to be appointed by each party, and such arbitrators, if unable to agree, were to appoint an umpire. The arbitrators were themselves to exercise the authority thus [142] conferred upon them, and could not delegate such power to any one else. Consequently, the appointment of an umpire in a manner totally different from that which the parties had agreed for, was, in my opinion, an invalid appointment. The case of *Re Hopper*, L. R., 2 Q. B., 367, relied upon by Mr. Scott for the plaintiffs in the argument before us, is no authority in support of the validity of the appointment of Mr. Symons by the Chamber of Commerce. In that case two arbitrators, not being able to agree in the appointment of an umpire, cast lots as to which of two persons nominated by them should be appointed umpire. There was, therefore, as COCKBURN, C. J., said in his judgment (page 375), a concurrent judgment as to the fitness of the person who was finally appointed, and when the arbitrators have come to such a concurrence, and the only difference between them is as to which of the two they shall appoint, and the appointment is settled by lots, such a case falls directly within the decision of *Neal v. Ledger*, 16 East., 51, a case upheld by the Court of Common Pleas in *European and American Steam Navigation Company v. Croskey*, 8 C. B., (N.S.), 397.

In the present case the arbitrators nominated no one as umpire, but left that duty to be performed by third parties, viz., the Chamber of Commerce.

Such being my view, the fifth question raised by the Chief Judge requires no answer.

The questions of law referred by the Chief Judge for our decision, I would, therefore, answer thus:—

To question

1. That the proper construction of the two documents of the 18th April and 24th September 1890, is that 25 bales grey dhoties relating to the O/3053 (i.e., the document dated 18th April), at an all round advance of 1d. per pair on the original limits, were to be shipped in the steamers in

November, December, January, in three monthly lots, about 8 bales to be shipped in each of those months.

2. That, with regard to this particular contract, evidence was not admissible to prove that the words "shipment" and "to [143] be shipped" have any other meaning than their plain and ordinary meaning.
3. This question does not require to be answered.
4. That the defendant is not bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire.
5. This question does not arise.

Farran, J. :—I agree in the answers which the Chief Justice proposes to give to the questions in this case, and do not, as to the first question, wish to add anything to what he has said.

The second question is a very important one, and I desire to add a few words, expressing my reasons for the opinion I have arrived at regarding it. That question as propounded is, I think, too wide to justify us in answering it in its actual words. It must be read in connection with the facts stated in the case, which narrow it to this :—Whether evidence of a usage in the Bombay piece-goods trade is admissible to explain the phrase "November, December, January" shipment and "bales to be shipped in each month" so as to alter its meaning into "November, December and January delivery to railway carriers at Manchester" and "bales to be so delivered in each month." Such evidence can only be tendered under section 92, proviso (5), or under section 98 of the Evidence Act. Under the earlier section and provision the instrument is read in its ordinary sense, but the custom or usages of a particular trade may add an incident to the contract. This is in accordance with English law. The rule and the reason for it are laid down and explained with great lucidity by PARKER, B., in delivering the judgment of the Exchequer Chamber in *Hutton v Warren*, 1 M. and W., at p. 474. "It has been long settled," (said His Lordship), "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which known usages have been established and prevailed: and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in [144] writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages." This evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent the evidence is not receivable, and the inconsistency may be evinced (a) by the express terms of the written instrument, or (b) by implication therefrom (see per BLACKBURN, J., in *Myers v Sarl*, 3 E. and B., 306, at p. 320). Those latter rules the Evidence Act adopts in enacting in proviso (5) that the annexing of such incident shall not be repugnant to or inconsistent with the express terms of the contract. In the case before us, to prove a usage that under a contract, which expressly provides that there shall be a shipment in a particular month, delivery to an inland carrier will satisfy the contract, is to prove a usage which does not add an incident to the contract in respect of which the contract is silent, but one which goes to establish that the performance in a different manner from that stipulated for is a performance of it. This is in contradiction to the express terms of the written instrument. The evidence of such a usage is, therefore not admissible under proviso (5) of section 92.

Is the evidence, then, admissible under section 98, which enacts that evidence may be given to show the meaning of * * * words used in a peculiar

sense? Mercantile usage is in such a case "the mercantile dictionary in which you are to find the mercantile meaning of the words which are used." Per Lord CAIRNS, L. C., in *Bowes v. Shand*, App. Ca., at p. 468. In such a case the evidence cannot properly be said to vary the contract; it only explains the meaning in which the mercantile terms in it are used. The difficulty here is that this is not what the case states as the result of the evidence. The custom set up is that the date of the carrier's weight note must be regarded as the date of shipment. It is not alleged that the word "shipment," which is the equivalent of "putting on board a ship" (see *Bowes v. Shand*, *supra*), has acquired in the Bombay piece-goods trade a technical meaning, or that it is used in a peculiar sense. What is alleged is that a delivery to [145] an inland carrier is treated, in the case of contracts made with members of the "Native Piece-goods Association" (of which the defendant is one), as equivalent to a performance of a contract 'to ship.' It is not alleged that the words "to ship" have acquired the technical or peculiar meaning of putting in a railway truck. I am not prepared to say that the expressions "to ship" and "shipment" may not acquire a meaning in a particular trade different from their plain ordinary and accepted meaning, and that evidence of such meaning may not be given under s. 98 of the Evidence Act, but I think that the evidence given in this case (being of the nature that it is) is not admissible for that purpose.

The third question does not arise.

I agree as to the fourth question; the answer must be in the negative. The contract provides for the arbitrators, in case of difference, appointing an umpire. It is not a compliance with such a provision for the arbitrators to refer the matter to the Chamber of Commerce, and for the latter body to select a gentleman to deal with the dispute. The case of *Re Hopper*, L. R., 2 Q. B., 367, has no application to the facts before us. There the arbitrators appointed an umpire. It was sought to treat that appointment as bad, on the ground that the arbitrators had decided by lot which of the two persons selected for appointment by the arbitrators respectively should be appointed. The Court ruled that, under the circumstances the appointment of the umpire was unimpeachable. Here the arbitrators made no appointment at all. They referred the whole matter to the Chamber of Commerce. That body are said to have dealt with it in the usual way. That is not the contract. What the parties contracted for, was that the arbitrators should appoint an umpire. It is unnecessary, in this view, for me to express an opinion as to the right of the defendant to withdraw from the arbitration, or whether in fact he did so. I wish for myself to say that I do not agree that it is law in India that one of the parties to a written reference can recede from it without cause before award made. The case of *Pestonjee v. Manokjee*, 12 Moo. Ind. Ap., p. 112, is an authority to the [146] contrary. *Koegler v. The Coringa Oil Co.*, 1. L. R., 1 Cal., 42, has no bearing upon the question. There one of the parties did not, in fact, appoint an arbitrator at all.

Attorneys for the Plaintiffs :—Messrs. R. S. Brown & Co.

• Attorneys for the Defendant :—Messrs. Balkrishna and Purozeshaw.

NOTES.

• [See also (1904) 30 Bom. at 15.]

Parsi Matrimonial Court.

The 29th July, 1892.

PRESENT:

MR. JUSTICE JARDINE.

Hirabai.....Plaintiff

versus

Dhunjibhoy Bomanji.....Defendant.*

Husband and wife—Parsi Matrimonial Court—Act XV of 1865—Suit by wife for judicial separation—Alimony—Alimony after decree dismissing wife's suit and pending appeal—Alimony pending petition for review of judgment—Practice in allotment of alimony.

A wife sued her husband for judicial separation in the Parsi Matrimonial Court. Alimony was granted to be by an order dated 11th July 1891, which directed the defendant to pay alimony to her from the 15th April 1891, "until the final decree herein be passed." On the 18th July 1891, the suit was dismissed, and after that date the defendant ceased to pay alimony. The plaintiff obtained a rule for review of judgment, which was discharged on the 27th January 1892, and on the 18th March 1892, she filed an appeal against the decree dismissing the suit and against the order refusing a review. She now applied for an order directing the defendant to pay her all the arrears of alimony "*pendente lite*" from the date of filing the suit, or so much as had not been paid, and that he should pay her further alimony until the final disposal of the appeal.

Held—

(1) Dismissing the application, that the words "final decree herein," contained in the order of the 11th July 1891, by which alimony was granted, meant the decree in the suit and not in the appeal.

(2) That the Parsi Matrimonial Court constituted under Act XV of 1865 had no power to award alimony "*pendente lite*" after decree and pending appeal.

(3) An unsuccessful wife is not entitled to claim alimony after final decree and pending appeal, nor for the period during which she is seeking review of judgment.

*Quære—*whether the Court where a petition for review is pending before it has a discretion to allot or continue alimony "*pendente lite*."

[147] The words, "during the suit," in section 33 of Act XV of 1865 include the period up to the making of a final or absolute decree.

Ellis v. Ellis, 8 P. D., 188, and *Dunn v. Dunn*, 13 P. D., 91, should guide the practice of the Parsi Matrimonial Court in allotment of alimony for the time following a decree nisi.

APPLICATION by a plaintiff, after dismissal of suit and pending appeal, for an order directing alimony to be paid from date of dismissal of suit until final disposal of appeal.

This was a suit, filed on the 24th March 1891, by a wife against her husband for judicial separation. On the 11th May 1891, she applied for alimony, which was granted by an order made on the 11th July 1891. This order

* Suit, No. 4 of 1891.

† [Sec. 33 :—In any suit under this Act for divorce or Judicial separation, if the wife shall not have an independent income sufficient for her support and the necessary expenses of the suit, the Court, on the application of the wife, may order the husband to pay her monthly or weekly during the suit such sum, not exceeding one-fifth of the husband's net income, as the Court, considering the circumstances of the parties, shall think reasonable.]

directed "that the defendant, Dhunjibhooy Bomanji, do pay to the plaintiff, Hirabai, as and by way of alimony *pendente lite*, the sum of Rs. 120 per mensem from the 13th April 1891, until the final decree herein be passed."

On the 18th July 1891, the suit was dismissed; after that date the defendant ceased to pay the plaintiff the alimony allowed by the above order.

The plaintiff obtained a rule *visi* for review of judgment, which was discharged on the 27th January 1892, and the review was refused.

On the 18th March 1892, the plaintiff appealed against the decree dismissing the suit and the order refusing a review.

On the 28th June 1892, the plaintiff presented a petition praying for an order directing the defendant to pay to her all the arrears of alimony *pendente lite* from the date of the filing of this suit, or so much thereof as had not been already paid, and that he should be directed to pay to her the sum already fixed as alimony *pendente lite*, being Rs. 120 per mensem, till the final disposal of the petitioner's appeal.

The matter now came on for argument.

Jardine (with *J. D. Nimuchwalla*) for Defendant showed cause:—No alimony can now be granted. The suit was dismissed and is over. Section 36 of Act IV of 1869 gives alimony only "pending the suit." The word 'suit' there does not include appeal. A husband cannot be required to enable [148] his wife to obtain the judgment of a second Court. Further, this Court cannot deal with the question. If the application can be made at all it should be made to the Court of Appeal. The appeal is against the decree and the order refusing a review, but no appeal lies against such an order. As to the merits, the review was refused because the Court was of opinion that on the allegations the plaintiff had no case. This application is made at a very late period. The petition was dismissed so long ago as the 18th July 1891; so there can be no pressing necessity—*Macrae on Divorce*, p. 3; *Wells v. Wells*, 3 S. and T., 542; S. C., 33 L. J., (P. M.), 151.

E. D. Reporter for Plaintiff in support of the rule:—The order for alimony until final decree must include the decree in appeal. As to the English practice, *Lovedon v. Lovedon*, 1 Phil., 208; *Jones v. Jones*, 41 L. J. (P. and M.), 53; *Nicholson v. Nicholson*, 3 S. and T., 214, in which case the words "*pendente lite*" are defined as meaning while the rights of the parties are in contest; *Wilson v. Wilson*, 3 Hagg., 329; *Browne on Divorce*, (5th Ed.), pp. 273, 379, 380. *Jones v. Jones*, 41 L. J. (P. and M.), 53, decides that alimony continues unless the subsequent proceedings are vexatious and frivolous. The appeal in the case has been admitted by the Court, so it cannot be regarded as frivolous. As to delay, the records of the Court will show that the plaintiff has not been guilty of any delay.

Jardine, J.:—The plaintiff sued for a judicial separation in this Court, and on the 18th July 1891, her suit was dismissed by Mr. Justice BIRDWOOD. The suit was filed on the 24th March. On the 11th May she applied for alimony,

* [Sec. 36:—In any suit under this Act, whether it be instituted by a husband or a wife and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just:

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.]

and got an order from the Judge on the 11th July, directing the payment of alimony *pendente lite* "until the final decree herein be passed." On the 9th September the plaintiff applied for a review of judgment, and on the 27th January 1892, the learned Judge, after a rule *nisi* and a hearing, refused to review, and ordered the plaintiff to pay the costs. The plaintiff appealed against the dismissal of the suit and the refusal to review; and her appeal was admitted [149] to the file of the High Court on the 18th March 1892, and now awaits hearing and decision. It is admitted that the defendant has paid the alimony up to the date of dismissal of the suit.

On the 28th June last, the plaintiff made application to this Court to direct the defendant to pay her all the arrears of alimony, and to pay her at the same rate as alimony *pendente lite* till the final disposal of the appeal. Mr. Jardine, for the defendant, contends that the appeal is vexatious and frivolous, and that the plaintiff is guilty of laches and delay, and that the Court ought, therefore, if it has any power to order payment of alimony after the dismissal of the suit, to refuse to do so in its discretion. He also argues that this Court has no jurisdiction, and that the application ought to have been made to the High Court, which is seized of the appeal. Mr. Reporter, for the plaintiff, urges that the form of the Judge's order shows that he meant the alimony to continue till the Court of Appeal had determined the case.

In my opinion, the words "final decree herein" mean the decree in the suit and not in the appeal. In Rule 190 of the English Rules (quoted in Browne on Divorce, 5th Ed., p. 234) the words "final decree" are used in this sense, and the expression sometimes means the absolute decree as compared with the decree *nisi*, as in COTTON, L. J.'s judgment in *Ellis v. Ellis*, 8 F. D., 188. In section 44 of Act XV of 1865 a final decree is contrasted with an *interim* order.

It has been conceded in argument that the Court of Appeal has power to direct payment of alimony pending the appeal. As authorities on the practice in England and the right of the wife as a general rule, to alimony pending the appeal, Mr. Reporter cites *Lovedon v. Lovedon*, 1 Phil., 208, in the Court of Arches and *Jones v. Jones*, L. R., 2 P. and D., 333 : S. C. 41 L. J. (P. and M.) 53, where it was affirmed by the Full Court. But no precedent in this Court, nor authority in any of the reports or text-books, has been cited to show that the alimony pending the appeal may be awarded by the Court whose decision has been appealed against.

[150] Another contention for the plaintiff is that section 33 of Act XV of 1865 should be interpreted as if the word "suit" included appeal in regard to the provision of alimony *pendente lite*, where divorce or judicial separation is sought. It is urged that after an appeal is admitted, this Court and the High Court have co-ordinate powers to award alimony. I do not think this is the necessary or reasonable meaning. In no section of this Act does the word, "suit" or "sue" necessarily take the meaning which includes appeal: such a meaning would conflict with sections 15 and 16 about jurisdiction and section

[Sec. 44.—In any suit under this Act for obtaining a judicial separation or a decree of nullity of marriage, or of or for dissolving a marriage, the Court may from time to time pass such interim orders and make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children under the age of sixteen years, the marriage of whose parents is the subject of such suit, and may, after the final decree, upon application by petition for this purpose make from time to time all such orders and provisions with respect to the custody, maintenance, and education of such children as might have been made by such Orders as to custody of final decree, or by interim orders in case the suit for children after final decree, obtaining such decree were still

44 about the custody of children. It may be supposed that, if the Legislature had meant to empower this Court to award alimony after appeal made, it would have used as plain language as in section 36 of the Indian Divorce Act IV of 1869.

Section 33 of Act XV of 1865 empowers this Court to order the husband to pay alimony "during the suit." It is the practice here to pass a decree *nisi* in the first instance upon a sentence of divorce. Since the Court was erected, there had been six sentences of nullity before I passed such a sentence in *S. v. B.*, L. R., 16 Bom., 639. In four of these cases the Court proceeded by decree *nisi*, possibly influenced by an amending Act of Parliament, which so far assimilates the English procedure in nullity to that in divorce: I followed these precedents in *S. v. B.*, L. R., 16 Bom., 639. I am informed by the Clerk of the Court that there has been only one successful suit for judicial separation (No. 3 of 1870): there the first decree made was a decree *nisi* to be made absolute after three months.

As, in the present case, I have had to consider the practice, I may now state my view that the words "during the suit" may be taken to include the period up to the making of a final or absolute decree. This view will make our practice conform to that of England. In *Hulse v. Tavernor*, L. R., 2 P. and D., at p. 261, the Judge Ordinary says: "The two decrees are the beginning and ending of the same Act, the one inchoate, and the other perfecting, or complete; a space of time being interposed to admit of enquiry." The same view was taken in *Norman v. Villars*, 2 Ex. D., 359. The matter [181] settled by two decisions in the Court of Appeal. In *Ellis v. Ellis*, 8 P. D., at p. 189, a decree *nisi* had been obtained by a wife, and was not appealed against. It was held, overruling *Latham v. Latham*, 2 Swab. & Trist., 299, that the Judge Ordinary has power to order alimony *pendente lite* notwithstanding a decree *nisi* has been made for dissolution of marriage. The reason given is as follows:—"Until the final decree the Court can make no permanent provision for the wife; therefore, it seems reasonable that it should have power to make some temporary provision." The case of *Ellis v. Ellis* has been distinguished from cases where the guilt of the wife has been established. In *Dunn v. Dunn*, 13 P. D., at p. 93, COTTON, L. J., says: "*Ellis v. Ellis* was an entirely different case. The wife there took the proceeding against her husband, and she had in no way forfeited her rights against him. The case was one where it would be proper ultimately to grant permanent alimony, and we thought it reasonable that in the meantime she should have intermediate alimony."

The Indian Divorce Act IV of 1869, section 36, in cases where a decree *nisi* has been pronounced, leaves less discretion to the Judge than the law of England. It provides no rule in cases of judicial separation; but as to suits for dissolution or nullity, it says that the alimony pending the suit shall continue until the decree is made absolute or confirmed. Mr. Macrae, at page 111 of his edition of that Act, considers that the Indian rule is based on *Wells v. Wells*, 3 Swab. and Trist., 542, but the judgment in *Dunn v. Dunn* shows that *Wells v. Wells* did not lay down a binding rule about the period between decree *nisi* and decree absolute. COTTON, L. J., says:—

"In *Wells v. Wells* there was no motion for a new trial; in the present case the motion for a new trial has been refused. We do not find on enquiry that *Wells v. Wells* has been treated in the Divorce Court as establishing such a general rule as is contended for—that, although the wife has been found guilty, the alimony must go on till the case is finally disposed of. Until adultery has been proved against the wife, she is entitled to [182] support, and the Court gives her alimony *pendente lite*. But, when her adultery has been proved, though

she is still a wife she has lost that right. Ought not the alimony then to stop at the verdict? * * The reasonable rule then appears to be that on the jury finding the wife guilty of adultery her right to alimony ceases, subject to this—that if the Judge thinks it reasonable so to do, he can continue it. Thus, for instance, he may think it not improbable that the wife will obtain a new trial, and succeed ultimately in establishing her innocence; in such a case he might well think it reasonable that the alimony should be continued. To hold that alimony continues as a matter of right till an application for a new trial is disposed of, would encourage frivolous applications for new trials.”

LINDLEY and BOWEN, L. JJ., concurred, and the former remarks: “It seems anomalous that the right should continue when a jury has found her guilty. If the verdict is against her, the onus must lie upon her to show that the alimony ought to be continued. The Judge ought to have power to give it to her, but I think it would be wrong to hold that without further order it continues after an adverse verdict.” I may here state, that as section 33 of the Act I have to administer (Act XV of 1865) does not limit the Judge’s discretion, as section 36 of the Indian Divorce Act does, I am of opinion that *Ellis v. Ellis* and *Dunn v. Dunn* should guide the practice in allotment of alimony for the time following a decree nisi.

It follows logically from the fact that an unsuccessful wife is not as of right entitled to claim alimony up to decree absolute, that she is not entitled to claim it after final decree—I mean pending appeal—nor for the period in which she is seeking review of judgment. *Wells v. Wells*, on which Mr. Jardine relies, is authority in England for holding that when the lower Court has declared its final judgment on the case it has no power to allot alimony *pendente lite*. What is said there about the divorce of a wife may well apply to her suit for judicial separation. “Where the cause is tried before the Court itself, that final conclusion will have been reached when the Court declares its judgment on the facts, for in this Court such judgment is [153] final.” And if an appeal carries the case forward, it also carries it into another Court competent to allot alimony, if it pleases.” The discretion to allot can be better exercised by the Court where the appeal is pending than by the Original Court. As Lord PENZANCE says in *Jones v. Jones*, in the report in 41 L. J., Prob., 53: “If there was fair ground for an appeal, it would be reasonable that alimony should be paid, but if a wife in all cases were entitled to alimony during the appeal, great evil might result. A wife found guilty of adultery might appeal for the sole purpose of getting alimony.” Now it is obvious that the Judge of the Court appealed from cannot properly exercise the judicial discretion indicated in this remark. I am of opinion that I have no power to allot alimony *pendente lite* after this Court has passed final judgment on the case.

It is, however, argued that the time taken up in the review proceedings ought to be excepted from this ruling, on the analogy of *Nicholson v. Nicholson*, 3 Swab. and Trist., 214, where on granting a new trial the Judge Ordinary said that the alimony *pendente lite* remained in force. Now, as pointed out in *Macrae*, p. 167, there is some resemblance between the reasons for, and procedure in new trial and review. I am not prepared to say that this Court, while a petition for review is still pending before it, may not have a discretion to allot or continue alimony *pendente lite*. I can well imagine cases to which the reasoning in *Dunn v. Dunn* may justly apply, where the Judge thinks that the wife may be ultimately successful. But no motion for continuing the alimony was made to Mr. Justice BIRDWOOD: the present claim is made after that learned Judge had finally refused the review, with costs, and after he had

ceased to be Judge of this Court. The reasoning in *Wells v. Wells* clearly shows that I should refrain from interference, especially as the wife has appealed against the order refusing to review. There the Judge Ordinary laid down that "such alimony can only be allowed, if paid or enforced, while the question of a new trial is still open." The judgment of this Court being final, so far as this Court is concerned, I refuse alimony for the period of the review proceedings.

[154] To grant it on an application made so late, the husband having no notice of it before, and, therefore, no special reason for getting the review matter determined speedily, would encourage frivolous endeavours to spin out litigation at the husband's expense. Alimony is given *pendente lite* for the husband's protection, to prevent the wife using the husband's credit, but the course taken since the dismissal of the suit has left him without this protection. The basis of the wife's application is that she is without means. I ask, as in *Noblett v. Noblett*, L. R., 1 P. and D., 651, if the plaintiff was in such a state, why did she not apply earlier?" See, too, *Twisleton v. Twisleton*, L. R., 2 P. and D., 339. I must refuse to allot alimony during the review proceedings on the ground of delay. I now dismiss the application with costs.

• [17 Bom. 154]

ORIGINAL CIVIL.

• The 2nd September, 1892.

PRESENT :

MR. JUSTICE BAYLEY, (ACTING CHIEF JUSTICE), AND MR. JUSTICE FARRAN.

Framji Manekji Punjaji and another.....Plaintiffs

versus

The Secretary of State for India in Council.....Defendant.

Abkari (Bombay) Act V of 1878, Sec. 55—Construction—"Or" read "nor"

• Order of confiscation.

Section 55 of the Bombay Abkari Act V of 1878, provides that "no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." Certain casks of vinegar belonging to the plaintiffs were seized by the Collector of Bombay on the 5th November 1891, and an order of confiscation was made on the 17th November 1891. The order was made after hearing the plaintiffs.

Held, that under the provisions of the Abkari Act, section 55, the Collector could not make a valid order of confiscation before the expiration of one month from the date of seizure.

REFERENCE from the Bombay Court of Small Causes, under section 69 of the Presidency Small Cause Courts Act (XV of 1862).

• [155] The Judge stated the case as follows :—

1. In this case the plaintiffs, who carry on business in Bombay in Indian condiments, sought to recover from the defendant the sum of Rs. 560, being the value of 25 casks of toddy vinegar, the property of the plaintiffs, imported

• Small Cause Court Suit, No. 5724 of 1892.

from Goa on the 7th of February 1891. The plaintiffs allege in their statement of claim that the said casks of vinegar were wrongfully and without any justifiable cause detained by the Collector of Customs at Bombay on their landing on the said 7th February, and then illegally and without proper cause seized by the Collector on the 5th November 1891, and illegally and unjustifiably confiscated on the 17th November 1891.

2. A copy of the summons and a copy of the plaintiffs' bill of particulars are hereto annexed.

3. The defence to the action was justification under the Bombay Abkari Act V of 1878. Sections 7, 9, 37, 54, 55 and 67* were particularly relied on in support of this plea.

[156] 4. The seizure and confiscation of the goods on the dates alleged in the particulars of demand were not denied.

[Clauses 5 to 9 of the case stated are not material for the purpose of this report, and are, therefore, omitted.]

* The following are the sections of Act V (Bombay) of 1878 referred to:—

Section 7.—Subject to such orders as aforesaid, the Commissioners may at any time after inquiry recorded in writing, fine, dismiss, suspend or reduce any subordinate officer appointed, or any officer on whom any additional powers or duties have been conferred or imposed by them under the provisions of the last preceding section, for any breach of departmental rules or discipline, or for carelessness, unfitness, neglect of duty or other misconduct.

Import of liquor or intoxicating drug. Section 9.—No liquor or intoxicating drug shall be imported by land or by sea into any part of the Presidency of Bombay unless—

(a) it is liable to the payment of duty under the Indian Tariff Act, 1875, or any other law for the time being in force relating to the duties of customs on goods imported into British India and the duty prescribed by such law has been paid thereon; or

(b) such import is permitted under the power next hereinafter conferred.

Subject to the orders of Government, the Collector may from time to time :

(c) permit the import of liquor, or intoxicating drug, or of any kind of liquor or intoxicating drugs other than liquor or intoxicating drugs liable to the payment of duty under such law as aforesaid, on payment of duty, if any, to which the same is liable under this Act and on such other terms as he thinks fit, and

(d) Cancel such permission.

Power to seize liquor, &c., in open places, and to detain, search and arrest.

Section 37.—Any Commissioner, or Collector, or other Abkari Officer duly empowered in this behalf, may

(a) seize in any open place, or in transit, any liquor or intoxicating drug or any other thing which he has reason to believe to be liable to confiscation under this or any other law for the time being in force relating to Abkari revenue ;

(b) detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and if such person has any such liquor, drug, or other thing in his possession, arrest him.

Section 54.—All liquor or intoxicating drugs imported, exported, transported, removed, manufactured, sold or had in possession in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act, and

What things liable to confiscation. All toddy drawn from any tree in contravention of this Act, or of any such rule, order, license, permit, or pass as aforesaid ; and

All liquor, if any, and all intoxicating drugs, if any, lawfully imported, exported, transported, removed, manufactured, sold, or had in possession, and all toddy, if any, lawfully drawn, along with, or in addition to, any liquor or intoxicating drugs, imported, exported, transported, removed, manufactured, sold or had in possession, or along with or in addition to any toddy drawn as aforesaid, and

All stills, utensils, implements or apparatus whatsoever for the manufacture of liquor or of any intoxicating drug, used, kept, or had in possession in contravention of this Act, or of any rule or order made under this Act, or of any license obtained under this Act, and

[157] The order of confiscation was made after hearing the plaintiffs.

10. The points for determination were:—

(1) Whether this vinegar was liquor within the purview of the Bombay Abkari Act V of 1878?

(2) If so, whether it is liable to the payment of duty under the Indian Tariff Act XVI of 1875, or any other law for the time being in force relating to Custom duties on goods imported into British India?

(3) Whether the seizure was properly made on 5th November 1891?

(4) Whether the order of confiscation of 17th November 1891, fulfils the requirements of section 55, and whether it is valid even though made before the expiration of a month from the date of seizure, but after hearing the plaintiffs and receiving such proofs as they wished to adduce?

[158] (5) If such order was invalid, what damages, if any, were the plaintiffs entitled to under the circumstances of the case?

11. As to section 67, I was of opinion that the acts complained of were not within its protection. Moreover, the Collector could not be said to have acted *bona fide*, in the legal sense of the term.

12. In the view I took of the 55th section it became unnecessary to decide the first, second and third questions.

13. It runs thus:—"All confiscations under this Act shall be made by the Collector; provided that no order of adjudication shall be made by the Collector until the expiration of one month from the date of seizing the things

All materials collected or had in possession for the purpose of unlawfully manufacturing liquor or any intoxicating drug, and

The vessels, packages, and coverings in which any liquor, intoxicating drug, still, utensil, implement, apparatus, or material aforesaid, is found, and the other contents, if any, of the vessel or package in which the same is found, and the animals, carts, vessels, or other conveyances used in carrying the same,

Shall be liable to confiscation.

Order of confiscation by whom to be made. Section 55.—All confiscations under this Act shall be adjusted by the Collector :

Provided that no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim.

Whenever confiscation is ordered under this Act, the owner of the thing ordered to be confiscated may, at the discretion of the Collector, be given an option of redeeming it on payment of such fine as the Collector thinks fit.

Section 67.—No action shall lie against Government, or against any Abkari Officer for damages in any Civil Court for any act *bona fide* done or ordered to be done by them in pursuance of this Act, or of any law at the time in force relating to Abkari revenue,

Bar of action.

And all prosecutions of any Abkari Officer, and all actions, which may be lawfully brought against Government or against any Abkari Officer, in respect of anything done, or alleged to have been done, in pursuance of this Act, shall be instituted within four months from the date of the act complained of, and not afterwards,

And any such action shall be dismissed

(a) If the plaintiff does not prove that, previously to bringing such action, he has presented all such appeals allowed by this Act, or by any other law for the time being in force, as within the aforesaid period of four months it was possible to present; or,

(b) In the case of an action for damages, if tender of sufficient amount shall have been made before the action was brought, or if, after the institution of the action, a sufficient sum of money is paid into Court with costs, by or on behalf of the defendant;

Provided that nothing in this section shall be deemed to affect the powers or jurisdiction of Her Majesty's High Court of Judicature or of the Court of Small Causes at Bombay.

intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." This is a highly penal proceeding, and, to put it very mildly, it makes one of the parties a judge in his own cause. It ought to receive a strict interpretation. It first provides that all confiscations shall be made by the Collector. Then follows a provision, which is expressed in negative terms, and is, therefore, imperative. It says no such order shall be made until the expiration of a month. This is the first limitation to the exercise of the Collector's powers. It peremptorily forbids him to pass the order in any event, until the lapse of a month. If he makes one within the prescribed period, it is wholly void and inoperative, and is a mere nullity. The proviso then goes on to impose another condition, and the restriction to the exercise of his power in respect of a wholly different matter, *viz.*, he is not to make the order without hearing the claimant or objector. It has been maintained for the defence that the proviso authorizes the Collector to adjudge confiscation upon the happening of one of the two contingencies either after a month or after hearing the claimants. If this argument be sound, the Collector would not be bound to grant a hearing. He may positively refuse to hear, wait for a month, and then confiscate the goods. If the two clauses are to be read in the alternative, that would be the necessary consequence. He has the option of doing one of two matters, and he does one, no matter why, in preference to the other. This construction [159] would be revolting to the legal mind. Mr. Little felt the force of the objection, and sought to destroy it by suggesting a transposition of the two clauses, which he thought would make the "hearing" compulsory. In the first place, such a transposition is inadmissible in a fiscal statute, but, secondly, it does not really help to solve the difficulty: "Provided that no order of adjudication shall be made without hearing any person who claims a right to the things seized, or until the expiration of a month after seizure." This leaves the Collector's option untouched. He may still elect to postpone taking action for a month instead of hearing the party grieved. If the clause relating to "hearing" acquires an obligatory force by reason of its holding the first place in the sentence, why should not the clause applicable to the month make it equally incumbent on the Collector to stay his hand until the expiration of a month? It already stands first.

14. The construction placed by the Court upon the section and its proviso receives strong support from the following considerations. It avoids the consequence of a precipitate decision by leaving the Collector freedom for a whole month to alter his mind, or modify his views. At the same time the party feeling himself aggrieved has a whole month within which to produce his evidence. The draftsman was no pedant. Having enjoined a prohibition as to time he did not pause to consider whether the use of the conjunction "nor" instead of "or" in the sentence would not better satisfy all grammatical proprieties. For these reasons the Court disallowed the plea of justification.

15. The remaining question relates to the amount of damages. For this purpose the whole circumstances of the case must be looked to from 7th February. There were repeated demands. The plaintiffs were deprived of the possession and use of their goods. The Collector persistently, and in spite of plaintiffs' remonstrances, refused to deliver up the goods. The detention, after the Collector had opportunities of satisfying himself as to the quality of the goods for the purposes aforesaid, was unauthorized. I, therefore, awarded the value of the goods before they got deteriorated in the manner and owing to the causes stated in this reference.

[160] There was a decree in plaintiffs' favour for Rs. 307 and costs contingent upon the opinion of the High Court.

16. At the close of the case I was required by Mr. Little to state a case for the opinion of the High Court, which I have now the honour to solicit upon the questions—

(1) Whether under the provisions of section 55 of the Bombay Abkari Act of 1878 the Collector can make a valid order of confiscation before the expiration of one month from the date of seizing the things intended to be confiscated, but after hearing the person who claims a right to them?

(2) Whether the plaintiffs were entitled to the damages awarded in the face of their admission that the goods were valueless at the time of seizure and confiscation in November?

Anderson, for the Plaintiffs:—As to the construction of section 55 he contended that "or" should be read "nor."

Lang (Acting Advocate-General) for the Defendant.

The following authorities were referred to:—Maxwell on Statutes, p. 284 *Metropolitan Board of Works v. Steed*, 8 Q. B. D., 445.

Bailey, C.J. (ACTING):—In this case I am of opinion that the learned Small Cause Court Judge's view of the proper construction to be given to section 55 of Act V. of 1878 is correct. The provisions of this Act, it is to be remarked, are intended to be in protection of the subject. It is also to be borne in mind that they are of a highly penal nature. The Court, therefore, will be very averse to anything like a strained construction of this section if that construction is one which tends to cut down the protection intended to be given to the public.

Now this section runs thus:—

"All confiscation under this Act shall be adjudged by the Collector, provided that no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim.

[161] "Whenever confiscation is ordered under this Act, the owner of the thing ordered to be confiscated may, at the discretion of the Collector, be given an option of redeeming it or payment of such fine as the Collector thinks fit."

To my mind that language is sufficiently plain and intelligible. It may be that it would be more strictly grammatical to have used 'nor' instead of 'or' in this sentence. But the meaning of the section, I think, is clear; it is that both these conditions must be fulfilled before an order of confiscation can be made. And that this was the deliberate intention of the Legislature I can very well believe. A month does not seem too long a period to provide before such a serious step as an order of confiscation is allowed to be taken. It is highly desirable that such an order as that should not be made in a hurry.

The construction contended for by the Advocate-General is, I think, a very laboured construction entailing a distant straining of the language of the section; which, as I have already said, seems to be plain and intelligible enough as it stands. Why should the Court so strain the language of the section? I think no reason, certainly no sufficient reason, has been shown as to taking that course, if we are at liberty to take it.

On these grounds I think the answer to the first question, referred to us by the learned Fourth Judge of the Small Cause Court, should be in the negative.

Farran, J.:—I am quite of the same opinion. Now the first provision of this section 55 is this:—

"No order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated * * *

That is in the broadest and the most imperative terms. It is a provision dealing with the condition of time. The second provision, viz., "or without hearing any person who claims a right thereto, &c." has nothing to do with the question of time. In such a section as this is—a section dealing with the conditions to be observed before making the order of confiscation—one would expect both these matters to be provided for: both a provision as to the time [162] that must be allowed to elapse before such an order is made and also a provision as to the claimant's right to be heard. Presumably, therefore, the second provision is an addition to, and not in substitution for, the first provision. Is there anything in the language used which overrides this presumption? On the contrary, it is only by reading this section, as perhaps a jurist might read it, that room is left for any other construction. Using language as it is commonly used, the word 'or' in a sentence constructed as this is, would as often be used as the word 'nor,' to which here, I think, it is clearly equivalent. The illustration put during the argument gives an example of such a case. One may say to a child "you are not to leave the house for an hour, or without your great coat." Can there be a shadow of doubt as to what is there meant? This property of the word 'or' in a sentence thus formed seems to be a peculiarity of the language, as is well shown by GROVE, J., in *The Metropolitan Board of Works v. Stead*, 8 Q. B. D., 445, at p. 447. In a sentence beginning with a negative, as this does, 'or' is understood as repeating or carrying on that negative, i. e., as equivalent to 'nor.'

Certainly, had the intention of the Legislature been otherwise, you would have expected to have found the plain and imperative provision that "no order should be made within one month" cut down or qualified by words equally plain and unmistakeable, and that we should not have been left to extract that intention by such a laboured and difficult process of argument as with the words as they now stand is required.

[17 Bom 162]
APPELLATE CIVIL

The 4th February, 1892

PRESENT

SIR CHARLES SARGENT, KT, CHIEF JUSTICE, AND MR JUSTICE BIRDWOOD

Gauskha (Original Plaintiff) Appellant
versus

Abdul Rophkha and another . . . (Original Defendants) Respondents *

*Decree against a sirdar — Political Agent's Court — Death of the sirdar —**Application for execution against the heirs — Change of status**Jurisdiction — Civil Court — Section 649, para 2, of the**Civil Procedure Code (Act XIV of 1882)*

A *sirdar* against whom a decree was passed in the Court of the Political Agent having died, the decree holder applied for execution against his heirs. The [163] Political Agent rejected the application, holding that he had no jurisdiction over the heirs who were not *sirdars*. The decree holder then applied for execution to the Court of the First Class Subordinate Judge of Dharwar, who would have had jurisdiction to try the suit if the deceased defendant had not been a *sirdar*, but that Court also rejected the application on the ground that section 649 para 2 of the Civil Procedure Code (Act XIV of 1882) applies in cases where the territorial jurisdiction of the Court is changed and not where the status of the parties is changed and that the decree holder should obtain a declaration that the decree was binding against the heirs who were not *sirdars*.

Held, reversing the order that the terms of the section are general and draw no distinction as to the nature of the cause which puts an end to the jurisdiction.

THIS was an appeal from the decision of Rio Bahadur Kasmirji Bulkishna Marathe First Class Subordinate Judge of Dharwar.

A decree was passed in the Court of the Political Agent at Kolhapur against one Abdul Rophkha, a *sirdar* and *jaghdar* of Bad in the Dharwar District. After the passing of the decree Abdul Rophkha died, and the applicant, Gauskha, *jaghdar* of Bad presented an application for execution of the decree against Hasan and Mahamadkha, sons and heirs of the judgment debtor, Abdul Rophkha. The Political Agent rejected the application on the ground that he had no jurisdiction over the sons who were not *sirdars*. The applicant, thereupon applied to the Court of the First Class Subordinate Judge of Dharwar who declined to pass an order for execution, being of opinion that section 649, para 2, of the Civil Procedure Code (Act XIV of 1882) "does not give jurisdiction in cases wherein there is a change of status of the parties to the decree. The said section has full scope in cases where the territorial jurisdiction of Court is changed, and not in cases where the status of the parties is changed. I am inclined to think that the plaintiff must obtain a declaration that his decree against the father, who was a *sirdar*, is binding on the heirs, although they are not *sirdars*." The Subordinate Judge accordingly rejected the application.

The applicant appealed to the High Court.

Shamray Vithal, for the Appellant

Mahadeo Waman Bhat, for the Respondents

Sargent, C J — The Subordinate Judge considers that section 649, para 2, of the Civil Procedure Code Act (XIV of 1882) does not [164] apply to

* Appeal, No 111 of 1891.

this case, because the jurisdiction of the Political Agent to execute the decree has ceased by reason of the change of status of the heirs, but the terms of the section are general, and draw no distinction as to the nature of the cause which puts an end to the jurisdiction. We may remark that this section has already been held applicable in *Vishnu v. Krishnarao*, I. L. R., 11 Bom., 152, to a case of this nature. As it is admitted by the pleader for the respondents that the First Class Subordinate Judge of Dharwar would have had jurisdiction to try the suit had the deceased defendant not been a *sirdar*, we must reverse the order and send the case back for the Court below to dispose of the application for execution. Costs to abide the result.

Order reversed and case sent back.

[17 Bom. 164]

APPELLATE CIVIL.

The 10th February, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Krishnarav Trimbak Hasabnis.....(Original Plaintiff) Appellant

versus

Shambarrav Vinayak Hasabnis and another.....(Original Defendants)
Respondents.*

Hindu law—Adoption—Adoption by a mother who has succeeded as heir to her son after the death of his widow.

An adoption to herself and her deceased husband by a mother who has succeeded as heir to her son after his death and that of his widow is invalid according to Hindu law.

THIS was an appeal from the decision of Khan Bahadur L. G. Fernandez, First Class Subordinate Judge of Poona.

One Trimbak died leaving a widow, Gangabai, and a son, Sadashiv, surviving him. Sadashiv afterwards died childless, leaving a widow, Anpurnabai, who also died. Upon her death her mother-in-law, Gangabai, succeeded as Sadashiv's heir. On the 2nd October 1885, she adopted the plaintiff Krishnarav to herself and her deceased husband Trimbak. Krishnarav now sued as such adopted son to recover certain property.

[165] The Court of First Instance rejected his claim, holding that his adoption by Gangabai after Anpurnabai's death was invalid.

The plaintiff appealed.

Jardine (with *Mahadeo Chimnaji Apte*), for the Appellant:—

The plaintiff's adoption is valid. Gangabai adopted him after her son, Sadashiv, and his widow were both dead. She had succeeded as heir to her son Sadashiv. The adoption, therefore, was in derogation only of her own estate, and not that of any other person. The ruling in *Thayammal v. Venkatarama*, L. R., 14 I. A., 67, relied on by the lower Court is not applicable here. In that

* Appeal, No. 15 of 1890.

case the widow of the son was living at the time of the adoption, and consequently the adoption had the effect of divesting her of her estate. For this reason, the adoption in that case was held to be invalid. The case of *Raja Vellanki Venkata v. Venkata Rama*, L. R., 4 I. A., 1, is nearer to the present case. Being a Madras case, the permission of the *sapindas* was there necessary. On this side of India neither the authority of the husband nor the permission of the *sapintlas* is necessary for an adoption.

When an estate once becomes vested in any one it cannot be divested by a subsequent adoption made by another person, but a mother can divest herself of her estate by adopting a son. The case of *Keshav Ramkrishna v. Govind Ganesh*, I. L. R., 9 Bom., 94, is not applicable, because in that case there were adoptions made both by mother-in-law and daughter-in-law, and the adoption made by the daughter-in-law was held to be valid. There is no difference in the mother's right to adopt, whether she succeeds as heir directly to her son, or whether she succeeds to him after the death of his widow.

Latham (Advocate-General with *Ganesh Ramchandra Kirtloskar*), for the Respondents:—There are two questions involved in the present case: (1) whether Gangabai had power to adopt, and (2) assuming she had, can the adoption have the effect of divesting the estate. We contend that, in the present case, Gangabai's power to adopt had become extinguished. There is a difference between [166] a mother adopting after her son's death and adopting after the death of that son's widow—Mayne's Hindu Law, section 104 (4th ed.). The Privy Council has ruled that when an estate returns to a widow after devolution to her grandsons and other descendants, the widow's power to adopt is gone. The power to adopt having become extinct, the adoption becomes invalid. *Raja Vellanki Venkata v. Venkata Rama*, L. R., 4 I. A., 1, is not applicable, because in that case the son had died unmarried, and, therefore, the adoption by the mother was held good. We rely upon the following rulings:—*Bhoobun Moyee Debia v. Ram Kishore*, 10 Moore's I. A., 279; *Pudma Coomari v. The Court of Wards*, L. R., 8 I. A., 229; *Thayammal v. Venkatarama*, L. R., 14 I. A., 67; *Tarachurn Chatterji v. Suresh Chunder Mookerji*, L. R., 16 I. A., 166; *Chandra v. Gojarabai*, I. L. R., 14 Bom., 463; West and Bühler, (3rd Ed.), pp. 982, 983, 985.

Mahadeo Chimnaji Apte, in reply:—The decisions in *Pudma Coomari v. The Court of Wards*, L. R., 8 I. A., 229, and *Bhoobun Moyee Debia v. Ram Kishore*, 10 Moore's I. A., 279, do not lay down that an adoption by a mother, as in the present case, is invalid for all purposes. What they lay down is that those adoptions were invalid with respect to the particular points involved in them. An adoption may be invalid for the purpose of succession, yet it may be good for spiritual purposes—*Kalaya v. Padapa*, I. L. R., 1 Bom., 248. The devolution of the estate on the daughter-in-law does not extinguish the power of the mother-in-law to adopt. The devolution of the estate on the daughter-in-law only suspends the power of the mother-in-law to make an adoption. If the daughter-in-law had made an adoption, there would have been no necessity for the mother-in-law to adopt, because, in that case, the daughter-in-law's son would have effectually provided for the spiritual benefit of the three immediate predecessors. Gangabai having succeeded as heir to her son, she was entitled to adopt—*Bykant Monee Roy v. Kisto Soonderce Roy*, 7 W. R., 392. In the original Hindu texts there is nothing to show that the power of a Hindu widow to adopt is restricted.

[167] *Sargent, C. J.*:—The plaintiff, *Krishnarav Trimbak*, claims his share in the properties mentioned in the plaint as the adopted son of one *Trimbak*, who died, leaving a widow *Gangabai* and a son *Sadasshiv*, who subsequently died, leaving a widow *Anpurnabai*. *Anpurnabai* died childless, and her

mother-in-law, Gangabai, who succeeded as Sadashiv's heir, adopted the plaintiff for herself and her husband on the 2nd October 1885.

The Subordinate Judge, proceeding on the assumption that Trimbak was separated from his brother, which was not disputed before us, held that the adoption was invalid, on the authority of the Privy Council decision in *Thayammal v. Venkatarama*, L.R., 14 I. A., 67. Their Lordships in that case held that an adoption with the permission of *sapindas* by a Hindu widow, after the husband's estate had vested in his son's widow, is invalid. This conclusion was arrived at by the Privy Council as a necessary consequence of the decision in *Pudma Coomari's* case, L. R., 8 I. A., 229, where it was decided by their Lordships, as the result of the decision in *Bhoobun Moyee Debia v. Ram Kishore*, 10 Moore's I. A., 279, that "by the vesting of the estate in the widow of the son the power of adoption (given by the deceased to his widow) was at an end and incapable of execution." Here, the son's widow was dead when the adoption by Gangabai took place, and such adoption would only divest Gangabai's own estate, a distinction which was made the ground of the decision in *Bykant Monee Roy v. Kisto Soonderee Roy*, 7 C. W. R., 392, in favour of the mother's adoption. But we do not think it is warranted by the language of the Privy Council in *Bhoobun Moyee Debia v. Ram Kishore*, as explained by the Privy Council in *Pudma Coomari's* case, L. R., 8 I. A., 245. They say: "The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being valid for all other purposes, which is the view that the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that upon the vesting of the estate in the widow Bhowani, the power of adoption was "at an end" and [166] incapable of execution." Again, in *Thayammal v. Venkatarama*, L. R., 14 I. A., 67, their Lordships say they "entirely concur in that view, and they are of opinion that the adoption, with the permission of *sapinda* in the present case, could have no greater effect as regards the right to property than the adoption under the deed of permission in the cases to which reference has been made." This language appears to us to be altogether inconsistent with any idea of the right to adopt being merely suspended during the widow's life. It is also to be remarked that the reasoning of the Court in *Bhoobun Moyee Debia v. Ram Kishore*, 10 Moore's I. A., 311, seems to allow of no such distinction being made. Their Lordships say: "The rule of the Hindu law is that in the case of inheritance the person to succeed must be the heir of the last full owner. In this case Bhowani Kishore was the last full owner, and his wife succeeds as his heir to a widow's estate. On her death the person to succeed will again be the heir at that time of Bhowani Kishore"—meaning, as we apprehend, that the son adopted by the mother could not succeed, as he would, as such, be primarily the heir of her husband and not of her son.

The subject of the adoption by a mother higher in the line than the son is discussed in West and Bühler, (3rd Ed., p. 984), from the ceremonial point of view, and such adoption is held invalid on the ground that the son would be placed in a worse position as regards the due performance of his *sraddhas* than if there had been no adoption—and they conclude by laying down, as a consequence of that view, that "a mother succeeding to her son after the son's investiture is not the more capable of adopting a son to him, because she divests no estate but her own." In this Presidency, doubtless, the permission of *sapindas* is not required, but that circumstance cannot affect the application of the above rule, as explained and applied in *Thayammal v. Venkatarama*, L. R., 14 I. A., 67.

We have been referred to a decision of the Calcutta High Court—*Mañik Chand Golecha v. Jagat Settani*, I. L. R., 17 Cal., 518, at p. 537—where the [169] circumstances of the case were the same as here. MITTER and BEVERLEY, JJ., there say: "It is true that in their later judgment the Privy Council decided that upon the vesting of the estate in the widow of Bhowani the power of adoption was "at an end" and incapable of execution, but the power in that case was a power given by the husband, and the decision referred to lays down the limit of the time within which such a power should be exercised." It is plain from this that the attention of the Court had not been directed to the decision in *Thayammal v. Venkatarama*, L. R., 14 I. A., 67, that the ruling in *Bhoobun Moyee Debia v. Ram Kishore* was equally applicable where the adoption was made with consent of *sapindas*.

From the above Privy Council decisions, taken together, we think that the question under consideration is concluded by authority, and that the adoption by Gangabai after Anpurnabai's death was invalid; and that the decree must, therefore, be confirmed with costs.

Decree confirmed.

NOTES.

[The mother can adopt where she is the *immediate* heir to her son but not where the estate, in separate families, comes to her after devolving to other heirs:—(1894) 19 Bom., 33F.; (1902) 26 Bom., 526; (1895) 20 Bom., 250. See also (1896) 22 Bom., 416; (1898) 23 Bom., 327; (1900) 25 Bom., 306; (1914) 27 M. L. J., 306.]

An intermediate vesting in such heirs, terminates, ever after, the power to adopt, however derived, and that power is not revived by any subsequent vesting, the exception being the case of co-widows, etc.:—(1906) 33 Cal., 1306; 11 C.W.N., 12; 4 C.L.J., 357.]

[17 Bom. 169]

APPELLATE CIVIL.

The 15th February, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Jijaji Pratapji Rajee and others.....(Original Plaintiffs) Appellants

versus

Balkrishna Mahadeo and others.....(Original Defendants) Respondents.*

Pensions Act (XXIII of 1871), Secs. 4 and 6—Collector's certificate—

Certificate not obtained when suit filed—Certificate not produced at

hearing—Adjournment asked for and refused—Certificate

accepted in appeal and placed on record—

Procedure—Practice.

A suit under the Pensions Act XXIII of 1871 is not bad *ab initio* by reason of its being filed without a Collector's certificate.

Where at the hearing of such a suit the necessary certificate was not produced,

Held, that the Judge ought to have granted the plaintiffs' application for an adjournment, in order that the certificate might be obtained and produced.

THIS was a second appeal from the decision of H. J. Parsons, District Judge of Thana.

[170] Suit to recover revenues of a village granted *in am* to the plaintiffs by the defendants, who were the *khots* of the village.

* Second Appeal, No. 673 of 1885.

This action was originally instituted by plaintiffs Nos. 1 and 2 (Jijaji Pratapji Rajee and Narayan Manaji Rajee) in their own names. Plaintiffs Nos. 3 and 4 were subsequently joined on their own application.

The plaintiffs sought to recover one-half of the revenues of the village of Kandali, granted to them in *inam*, from the *khots* of the village, defendants Nos. 1 and 2.

Defendant No. 3 was joined afterwards, as claiming the right to the revenues himself as *inamdār*.

Defendants Nos. 1 and 2 disputed (*inter alia*) the right of the plaintiffs as *inamdars*, and set up the plea of limitation.

Defendant No. 3, Kanoji Ramaje Raji, pleaded that the suit was barred by the Statute of Limitation, and also by the Pensions Act (XXIII of 1871).

The Subordinate Judge (Rao Saheb Sakharām M. Chitale) held that the claim would lie although the plaintiffs had not obtained a certificate under the Pensions Act (XXIII of 1871), sec. 6, but rejected it on the ground that it was barred by limitation.

The plaintiffs appealed to the District Court on the point of limitation, and defendant No. 3 on the point relating to the certificate under the Pensions Act.

In appeal, the only issue raised was "will this suit lie without a certificate from the Collector, having regard to the provisions of the Pensions Act of 1871," and the finding thereon was in the negative.

The District Judge in his judgment remarked:—

"I am asked to adjourn the case to allow of the plaintiffs' procuring a certificate, and a case in the Printed Judgments, 1888, p. 52, is cited. There I notice that there was a certificate, though not a very clearly worded one. Printed Judgments, 1877, pp. 228, 314 and Printed Judgments, 1880, p. 56, are cited on the other side. I think that the suit being filed without a certificate is bad *ab initio*, and must be dismissed. Were I disposed to grant time, it would be useless, because as the suit could only be said to have been properly brought at the time when [171] the certificate is produced, the claim would now be time-barred. The plaintiffs' remedy, however, was not by a suit at all, but by application to the revenue authorities. The decree of the Court dismissing the suit is, therefore, confirmed on the finding of the only point that I have raised."

The plaintiffs appealed to the High Court.

Mahadeo Chhimanaji Apte for the Appellants (Plaintiffs):—Our suit was dismissed by the lower Court, because the Collector's certificate under the Pensions Act was not produced, the property in dispute being *saranjam*. The Court gave no opportunity to produce the certificate, being of opinion that the suit must be held to be brought on the day the certificate is produced, and that it would then be time-barred. The lower Court is wrong, and it ought to have given us an opportunity to produce the certificate. The suit is not instituted on the day the certificate is brought—*Nawab Mahammad Azmat Ali Khan v. Mussumat Lalli Begum*, L. R., 9 I. A., 8. We have got the necessary certificate, and we tender it.

Branson (with *Mahadeo Bhaskar Chavhal*) for Respondents Nos. 2 and 3, and *Daji Abaji Khare* for Respondent No. 1:—Under the provisions of the Pensions Act, the Court can only take cognizance of a suit when the certificate is produced, and not before. A suit launched without a Collector's certificate

cannot be recognized as a suit. The suit when it was brought was not properly constituted—*Kalidas Kevaldas v. Nathu Bhagvan*, I. L. R., 7 Bom., 217.

Mahadeo Chimnaji Apte, in reply:—The suit was instituted when it was originally filed, and it is not barred. A suit cannot be barred except under the provisions of the Limitation Act (XV of 1877), section 4. But the explanation of that section says that a suit is instituted when the plaint is presented to a proper officer. The point is, therefore, whether the plaint was presented to a proper officer, and not whether it was accompanied by a certificate. There are special provisions in the Limitation Act under which suits are barred, &c. But there is no section with respect to the provisions of the Pensions Act, nor is it laid down that a plaint must comply with the provisions of a particular enactment. In order to satisfy the requirements of the Limitation Act, a plaint is to be presented to a proper officer within a prescribed period, and nothing more. An analogous case is where a minor brings a suit, and a guardian *ad litem* is appointed afterwards. In that case the suit is held to be instituted on the day the plaint was presented, and not when the guardian *ad litem* was appointed. Similarly, when a suit is filed on an insufficient Court fee, it is held to be filed on the day the plaint was presented, and not on the day on which the deficiency in the Court fee is made up. We now produce the Collector's certificate, and ask to have it put on in the record.

The certificate was put on the record.

Sargent, C. J. :—We agree with the District Judge that the suit is one which falls within the Pensions Act as relating to a grant of land revenue, and that, too, although the Government is not a party to the suit—*Babaji v. Rajaram*, I. L. R., 1 Bom., 79. But the District Judge is wrong in treating the suit as bad *ab initio* by reason of its having been filed without a certificate. The remarks of the Privy Council in *Nawab Mahammad Azmat Ali Khan v. Mussumat Lalli Begum*, L. R., 9 I. A., at p. 20, show that this is not so, and that the Court is only precluded from taking cognizance of it until the certificate is produced. The District Judge should, therefore, on being asked to do so, have adjourned the case for the production of a certificate.

The certificate is now produced; and we must, therefore, reverse both the decrees of the Courts below and remand the case for a fresh trial, as all that has hitherto been done by the Subordinate Judge without the certificate was done without jurisdiction.

As regards the question of the Statute of Limitations, we are of opinion that the suit must be treated as having been instituted by plaintiff No. 1. Costs to follow the result.

Decree reversed and case remanded.

NOTES.

[This was followed in (1902) 25 All., 73; (1910) 12 Bom. L. R., 303; (1912) 17 C. W. N., 408; 17 C. L. J., 238; 17 I. C., 490, (adjournment).]

[173] APPELLATE CIVIL.

The 30th March, 1892.

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Bhogilal.....(Original Plaintiff) Appellant
versus

Amritlal.....(Original Defendant) Respondent.*

Limitation Act (IX of 1871), Art. 148—Acknowledgment—Acknowledgment by one of several mortgagees as agent for the others—Acknowledgment by one of several heirs of the mortgagee—Not sufficient—Mortgage—Redemption.

Under article 148† of the Limitation Act (IX of 1871), an acknowledgment of the mortgagor's title by one of several mortgagees as agent for the others is wholly ineffectual, and does not bind the rest. So, too, is an acknowledgment by one of several heirs of the original mortgagee without effect. The expression "some person claiming under him" in article 148 of the Act means some person claiming under him the *entirety* of the mortgagee's rights.

The property in dispute was mortgaged by Hari Bhagti to the firm of Kasandas Becharadas in 1816. In 1830 Jagjivandas, one of the sons and heirs of Kasandas, who was then manager of the firm on behalf of the whole family, sub-mortgaged the property in dispute to a third party, under a bond which recited the original mortgage by Hari Bhagti to Kasandas. In 1885 the defendant, who was a descendant of Kasandas, redeemed the sub-mortgage effected by Jagjivandas. In 1887 the plaintiff, having purchased the equity of redemption from Hari Bhagti's descendants, filed the present suit for redemption of the mortgage of 1816. The plaintiff relied on the acknowledgment made by Jagjivandas in 1830 as giving a fresh starting point to limitation.

Held, that the suit was barred by limitation. The acknowledgment by Jagjivandas, whether as manager of the firm or as one of the heirs of the original mortgagee, was not sufficient under article 148 of the Limitation Act (IX of 1871).

SECOND APPEAL from the decision of Venkatrao R. Namdar, Acting Joint Judge of Ahmedabad, confirming the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge, in Suit No. 1124 of 1887.

* Second Appeal, No. 192 of 1891.

† [Art. 148 :—

Description of suit.	Period of limitation.	Time when period begins to run.
Against a mortgagee to recover possession of immovable property mortgaged.	Sixty years ...	<p>The date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him, and, in such case, the date of the acknowledgment.</p> <p>Provided that all claims to redeem arising under instruments of mortgage of immovable property situate in British Burmah, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that Province immediately before the same day.]</p>

This was a suit for the redemption of certain property which was mortgaged in 1816 A.D. by the firm of Hari Bhagti to the firm of Kasandas Bechardas.

Kasandas Bechardas had three sons—Gangadas, Jagjivandas and Raghunath. On Kasandas's death Jagjivandas became the manager of the firm and also manager of the family estate. And in 1830 he sub-mortgaged the property in dispute to Narbheram [174] Sukhmal by a mortgage-bond, which recited the fact of the mortgage by Hari Bhagti to Kasandas Bechardas.

In 1885 A.D. the defendant, who was a grandson of Raghunath, the third son of Kasandas, redeemed the sub-mortgage effected by Jagjivandas in 1830.

In 1887 the plaintiff, having purchased the equity of redemption from Hari Bhagti's descendants, filed the present suit to redeem the mortgage of 1816.

The plaintiff contended that the acknowledgment of the original mortgagor's title made by Jagjivandas in the mortgage-deed of 1830 gave a fresh starting point to limitation, and that the suit was, therefore, within time.

The defendant pleaded (*inter alia*) that the suit was barred by limitation, and that the acknowledgment in question was not binding on him, or sufficient to save the bar of limitation.

Both the lower Courts rejected the plaintiff's claim as barred under the Limitation Acts XIV of 1859 and Act IX of 1871.

Against this decision the plaintiff preferred a second appeal to the High Court.

Gokuldas Kahandas Parekh, for Appellant:—The acknowledgment by Jagjivandas of the original mortgagee's (*sic*) title operates under article 148 of Act IX of 1871 to give a fresh starting point for limitation. At the date of the acknowledgment Jagjivandas was a managing partner in the firm to which the property in suit was mortgaged. And as a partner in a going concern Jagjivandas must be presumed to have an implied authority to make the acknowledgment on behalf of the whole firm. The acknowledgment, therefore, binds the firm—*Premji Ludha v. Dossa Doongersey*, I. L. R., 10 Bom., 358. Jagjivandas was, moreover, a manager of the family, and in this character also he had authority to make the acknowledgment in question so as to bind his co-sharers—*Ghinnaya v. Gurunatham*, I. L. R., 5 Mad., 169.

[TELANG, J., referred to *Richardson v. Younge*, L. R., 6 Ch. A., 478, as showing that, in the case of a mortgage to two persons jointly, there must be a joint acknowledgment.]

[175] Under article 148 of the Limitation Act IX of 1871 the acknowledgment need not be by all the heirs of a mortgagee. It is sufficient if it is made by "some person claiming through the mortgagee." Jagjivandas was admittedly one of the heirs of the original mortgagee. His acknowledgment was, therefore, sufficient.

Ganpat Sadashiv Rao, for the Respondent:—This suit is governed by Act IX of 1871. The case of *Premji Ludha v. Dossa Doongersey*, I. L. R., 10 Bom., 358, does not apply, as it was decided under the present Act XV of 1877, which has made a material alteration in the law as to acknowledgment. Under the former Act IX of 1871 an acknowledgment by an agent of the mortgagor's title was absolutely ineffectual to give a fresh starting point—*Kahmani Bibi v. Hulas Kuar*, I. L. R., 1 All., 642. As a managing partner in the firm, Jagjivandas' acknowledgment cannot be put on a higher footing than that of an agent. It is, therefore, ineffectual. As a manager of the family, his acknowledgment is equally invalid—*Naranji v. Bhagvandas*, P. J. for 1881, p. 238. The case of *Richardson v. Younge*, L. R., 6 Ch. Ap., 478, is in point. It clearly lays down that one of several mortgagees has no authority to bind the others.

by his sole acknowledgment, and that is also the principle adopted in section 21 of Act XV of 1877. Refers to *Mussummat Mah Bibi v. Motan Mal*, 12 Punjab Records, 162. As laid down in this case, the expression "some person claiming under the mortgagor" in article 148 of Act IX of 1871 means some person claiming the entire interest of the mortgagee. Jagjivandas, being one out of three heirs of the original mortgagee, could not be said to be a person claiming the entire interest of the mortgagee. This acknowledgment is, therefore, ineffectual.

Jardine, J.:—It is admitted that the mortgage to Kasandas took place in A.D. 1816: and that the present suit for redemption would be barred by the expiry in 1876 of the sixty years' period of limitation prescribed by Act IX of 1871, article 148, unless the acknowledgment made in 1830 by Jagjivan gives a new starting point. The Court below has found on the facts that Jagjivan was the son of Kasandas, who admittedly had [176] other heirs, and that Jagjivan was then manager of the mortgagee firm for and on behalf of the Hindu family to which the firm belonged, and was not sole owner thereof, but like the present defendant only one of several co-parceners—a co-parcener in his own right.

Under Act XIV of 1859, section 1, clause 15, there was a fresh starting point "if in the meantime an acknowledgment of the title of the depositor, pawnor or mortgagor, or of his right of redemption, shall have been given in writing signed by the depository, pawnee or mortgagee or some person claiming under him." Under Act IX of 1871, article 148, also the date of the acknowledgment is the starting point "where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him."

The only question argued is whether the written acknowledgment signed in 1830 by Jagjivan is sufficient. The contention of the plaintiff is twofold: first, that as Jagjivan was manager of a firm, a going concern, his acknowledgment was binding on the defendant, and for this *Premji Ludha v. Dossa Doongersay*, 1 L. K., 10 Bom., 358, was cited. This case, I may remark, construes the provisions of the Limitation Act, XV of 1877, and so do *Ravji v. Narayandas*, P. J., 1888, 147, and *Gadu Bibi v. Parsotam*, I. L. R., 10 All., 418, which follow the Bombay case. The Courts below have noticed that section 19 of the present Act has changed the law so as to include an acknowledgment signed by the agent of a mortgagee, whereas the similar provisions about agents in section 20 of the law of 1871 extended only to debts and legacies. In *Rahmani Bibi v. Hulas Kuar*, I. L. R., 1 All., 642, it was held that under Act IX of 1871 the signature of an agent was not sufficient. This decision is based on that of the Privy Council in *Luchmee Briksh Roy v. Kunjeet Roy Panday*, 13 Beng. L. R., 177, which interpreted the similar words of Act XIV of 1859. See also *Naranji v. Bhagvandas*, P. J., 1881, 238, which cites [177] *Kumarsami Nadan v. Pala Nagappa*, I. L. R., 1 Mad., 385, as to a manager's powers in a Hindu family and the discussion in West and Bühler, 612, 613. I think the authorities are against the first contention. Secondly, it was contended that the defendant is now the sole owner of the mortgagee's rights, and that as he becomes such by succession to the estate of Jagjivan and others, who were co-parceners in 1830, he is "a person claiming under" the mortgagee, and being, as to part of the mortgagee's rights the successor of Jagjivan, he is estopped from denying that Jagjivan's acknowledgment binds him.

The present case is one of first impression, and in the absence of Indian decisions on the words of article 148 of the Act of 1871 about the acknowledgment by the mortgagee, or some person claiming under him, I may refer to the

case of *Richardson v. Younge*, L. R. 10 Eq., 275. Vice-Chancellor MALINS affirmed—at p. 278—interpreting the Statute of Limitation 3 and 4, Will. IV, c. 27, s. 28, which is the authority given in Coote on Mortgage for the proposition that “where there is a mortgage to two jointly, there must be a joint acknowledgment.” The case differs from the present, in that the two joint mortgagees were trustees, and the decision is confined by Lord Justice JAMES to the case of mortgagees who are trustees and also that there were two joint trustees as defendants before the Court, while here the whole right of the mortgagees is now vested in one defendant, so that there is not apparently the same difficulty in taking a complete account. The reasoning applied seems to me, in spite of these differences, applicable to the construction of the Act of 1871. It is as follows:—see 6 Ch. Ap., at p. 480. The provision as to acknowledgment, which only refers to an acknowledgment by the mortgagee, would, if it stood alone, require an acknowledgment by all the mortgagees where there are more than one, it being provided by the General Clauses Act, 1 of 1868, that words in the singular shall include the plural. The distinction drawn between party and agent about debts and legacies in section 20 shows that the question of agency was before the mind of the Legislature, but there is no provision in article 148 or elsewhere as to signature by an agent for a mortgagee. A signature, there-[178] fore, by one of several mortgagees as agent for the others would be ineffectual, and it appears unsafe to hold that the acknowledgment of one binds all the others. The conclusion that the Legislature in 1871 omitted to provide for signature by a mortgagee’s agent seems affirmed by the fact that this was done in 1877, by the general provision of section 19 of the Act of that year. The above reasoning leads to the same result as the Privy Council decision in *Luchmee Buxsh Roy v. Kunjeet Roy Panday*, 13 Beng. L. R., 177, where their Lordships follow TYNDALE, C. J., in *Hyde v. Johnson*, 2 Bing. N. C.; 776, and interpret the Act of 1871 “according to its plain words” and exclude the signature of a mortgagee’s agent.

The above conclusion is not, however, sufficient for the determination of the present case. It is contended that Jagjivan’s interest as a co-parcener in 1830 brings him within the words “some person claiming under him,” i.e., under his father Kasandhs the mortgagee, and that the acknowledgment signed by Jagjivan is, therefore, sufficient under the Act of 1871. It being found, as a fact, that Jagjivan was only one of several heirs, and not sole owner of the mortgagee’s rights, the argument requires that the words be read as meaning “some one or more of the persons claiming under him”, or “any one or more of the persons claiming under the mortgagee the whole or any part of the rights conferred on him by the mortgagee.” We have then to determine whether these paraphrases embody the true construction, or whether the phrase means “some person or persons claiming under him the entirety of the mortgagee’s rights.” After considering the arguments I come to the opinion that the last is the real meaning. I leave out of consideration the case of joint tenants, of whom it is said in *Richardson v. Younge* at p. 481 of the Report—“if a joint tenant dies, there is no transmission of interest, and no person claims anything under him.” If as settled by that case where there is a mortgage to two jointly there must be a joint acknowledgment, I think it would be anomalous, in the absence of precise words, if an acknowledgment signed by one of many holding collectively the mortgagee’s rights were sufficient. I lay more stress on this view, because the doctrine [179] that one mortgagee can be treated as agent for the others in the matter of acknowledgment has, as determined by the authorities cited above, no place in the Acts of 1859 and 1871. In construing a statute we must not look to cases of

very rare and singular occurrence, but to those of every-day experience—*Hyde v. Johnson*, 2 Bing. N. C., at p. 780, and remember that Statutes of Limitation are in their nature strict and inflexible enactments, intended to quiet long possession and to extinguish stale demands—*Luchmee Buxh Roy v. Runjeet Roy Panday*, 13 Beng. L. R., 177. These principles would, I think, be imperilled if any owner of a mere fraction of the mortgagee's rights could by means of an acknowledgment exceed the powers of a joint mortgagee or an agent in regard to giving the mortgagor a new starting point for his claim.

No English case has been cited, nor any decision of an Indian High Court found, on the present question. Possibly it might have been, but in fact it was not raised in *Dain Chand v. Sarfraz*, I. L. R., 1 All., 117. The facts are not clear, and it is to be noted that it is said (at page 123) that the actual parties, the defendants-appellants, had signed the acknowledgments, and it cannot be gathered that there were any other owners of the mortgagee's right. The question was, however, determined by the Chief Court of the Punjab in *Musammut Mah Bibi v. Motan Mal*, 12 Punjab Records, 162. The views stated by FITZPATRICK, J. (BOULNOIS, J., concurring) are clearly, and I think correctly, expressed. He says:

"The question is one of considerable difficulty, and I give my opinion on it with considerable diffidence; but on the best consideration I have been able to bestow on it, I come to the conclusion that the suit is altogether barred. The 148th article of the Indian Limitation Act, 1871, is not new. It is copied, with some alterations which are immaterial for the purposes of the present question, from the 15th clause of the 1st section of the former law, Act XIV of 1859, and that, again, is taken with certain alterations and omissions, one at least of which seems to me important for the purposes of the present question, from the 28th section of the 3rd and 4th Wm. IV, c. 27

[180] "The 28th section of the 3rd and 4th Wm. IV, c. 27, provides that the mortgagor's suit to redeem shall be barred within a certain period reckoned from the date on which the mortgagee obtained possession, "unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given _____ in writing signed by the mortgagee or person claiming through him," in which case the period shall be reckoned from the date of such acknowledgment.

"Up to this point, our Acts have followed the English Act, but here comes the important difference. The English Act goes on to provide for the case of an acknowledgment by one of a number of mortgagees or persons claiming under a mortgagee, enacting that such acknowledgment shall be binding only as against the person making it, and providing for the apportionment of the mortgage-debt between him and the others, but no similar provision is to be found in our Acts. It is hardly conceivable that the Indian Legislature, having copied the English Act so far as they did, would not, if they intended that an acknowledgment by one of several mortgagees should have so peculiar an effect as that of breaking up the mortgage into portions; I say it is hardly conceivable that they would not have followed the English Act here, too, and enacted something more or less similar to its provisions on this point. I have no doubt that the omission, to do so was deliberate, and I can well understand that it may have been thought as well to avoid the difficulties and complications which there is reason to apprehend would, in many cases, arise from allowing to an acknowledgment by one of several mortgagees the effect in question. However this may be, it seems to me impossible, by any effort of construction, to get from the Indian Acts, as they stand, anything similar in effect to the provisions

of the English law on this point. There may be a transaction (and such transactions are not uncommon in this country), which, though spoken of as a single mortgage, is really a number of mortgages of different properties to different persons executed in the same sheet of paper. Such a transaction would, I presume, for the purposes of the 148th article of the Limitation Act, as I believe it usually is for all [181] other purposes, be treated on its proper footing, *viz.*, as a number of different mortgages, and if one of the mortgagees had given an acknowledgment in respect of the property mortgaged to him, the mortgagor might take advantage of that acknowledgment to redeem that property from him, the mortgage of it being really separable from or rather separate from that of the other properties.

"But where there is but one single mortgage to a number of persons, an acknowledgment by one of those persons cannot, under the 148th article, give a new period of limitation in respect to a portion or a share of the property mortgaged. It must either be absolutely without effect, or give a new period of limitation in respect of the whole property.

"I have, as I have already said, come to the conclusion that it is absolutely without effect. In *Richardson v. Younge*, L. R., 6 Ch. Ap., 478, a case in which some of the difficulties of the English law were brought out, Lord Justice MELLISH in commenting upon that Act (at page 489) makes an observation to the effect that, if it had stopped short at the point down to which, as I have shown, our Acts have followed it, it could not have been contended that the acknowledgment of one of several mortgagees would bind the others.

"Of that, I think there can be little doubt. But there is a slight difference in the wording of the Indian Acts to which I have not before adverted, and, which it may be contended, would afford ground for a distinction.

"The acknowledgment which the English Act requires is 'an acknowledgment in writing signed by the mortgagee or the person claiming through him;' while what the Indian Act requires is an acknowledgment 'in writing signed by the mortgagee or some person claiming under him.'

"It would hardly be disputed that, as observed by MELLISH, L. J., in the case I have just referred to, 'the mortgagee' in the English Act means 'the mortgagee or mortgagees,' and similarly that 'the person claiming through him' in that Act [182] means 'the person or persons for the time being claiming through him.'

"In like manner, it would hardly be disputed that 'the mortgagee' in the Indian Act means 'the mortgagee or mortgagees,' but it may possibly be suggested that the Indian Legislature, in using the words *some person claiming under him*, may have intended to include an acknowledgment like that in the present case given by one of several heirs or purchasers to whom different shares of the mortgagee's interest in the property or the mortgagee's interest in different portions of the property may have passed.

"But, in the first place, it is not likely that a change in this direction would have been made by the Indian Legislature, for the recognition of such acknowledgments would infallibly lead to collusion (such as is alleged to have occurred in the present case) between the mortgagor and one of the heirs or purchasers, and again it is hardly conceivable that one of several mortgagees who had together entered into the mortgage transaction should be unable to bind one another, and that one of several purchasers from a mortgagee should be given power to bind the others who might be perfect strangers to him. If a result of this sort was intended, we may be sure very clear words would have been used.

"It is accordingly natural to look out for some other construction of the words used, and I do not think there is any difficulty in finding a very reasonable one. I think 'some person claiming under the mortgagee' means some one of the persons or aggregates of persons who, from time to time, by purchase, inheritance or otherwise may have been in a position to claim under, i. e., to represent the mortgagee.

"This, I think, though as I have already said with some diffidence, is the proper construction of the Act; and I accordingly hold that an acknowledgment (such as that in the present case) by one of several heirs of the mortgagee is altogether without effect."

I think that if the Indian Legislature in 1871 or 1859 had intended to give effect to acknowledgments by persons claiming [183] only a fraction of the mortgagee's rights it would, to avoid the disquieting of titles and the revival of stale demands, as well as to secure its other object, have used plain words, as in section 28 of 3 and 4 Wm. IV, c. 27.

For these reasons, I am of opinion that the decree under appeal should be confirmed with costs.

Telang, J. :—I cannot say that I am entirely satisfied with the reasoning contained in the judgment of FITZPATRICK, J., concurred in by BOULNOIS, J., in the case of *Mussummat Mah Bibi v. Motan Mal*, 12 Punjab Records, 162, which was cited to us by Mr. Ganpatrao. Nor do I think that the case of *Richardson v. Younge*, L. R., 6 Ch. Ap., 478, to which I referred during the argument, has, except only to a certain extent, any very close application here, having regard to the actual language of the Act we have to construe. But as that language has, in fact, been construed by two learned Judges in one way, and as Mr. Justice JARDINE is satisfied with that construction, I think it would be right for me to follow it—especially in the case of an Act which is not any longer in force. And I do so the more readily, because I cannot say that I have myself formed any strong or clear opinion in favour of any other construction. According to the construction, then, which has been placed on Act IX of 1871, the claim of the plaintiff in this case was barred while that Act was in force, and the Act of 1877 could not, therefore, revive it. The Courts below were consequently right in deciding against the plaintiff, and the decree must be confirmed with costs.

Decree confirmed.

NOTES.

[Where the interest is joint, an acknowledgment by some is not sufficient :—(1896) 18 All., 458 (mortgagees); (1902) 25 Mad., 220 (mortgagors); (1909) 5 M.L.T., 261; (1909) 19 M.L.J., 288; (1914) 26 I.C., 127 (Mad.), (Anandran).]

This does not apply to cases where the interest has been severed :—(1909) 11 Bom. L. R., 318.

In (1912) 15 C.L.J., 251; 16 C.W.N., 493, it was held that the acknowledgment was valid as against the party acknowledging, though ineffectual against others.]

[184] CRIMINAL REFERENCE.

The 20th September, 1892.

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE TELANG.

Queen-Emress

versus

Kanji Bhimji.

Bombay Gambling Acts (IV of 1887 and I of 1890), Sec. 3—“Common gaming house”—“Instrument of gaming”—“Used”—Meaning of these words in section 3 of the Act.

The accused rented a place near a public road at Bombay at Rs. 250 a month. There they erected a shed containing eleven *pedhis* or stalls. In the centre of the shed they put up, in a prominent position, a clock for keeping accurate time. The stalls were let out to certain persons, each at the rate of Rs. 100 a month.

The roofs of several adjoining houses surrounded this place. From one of these roofs rain fell into the place.

Numbers of people resorted to this place for the purpose of rain-betting.

The rain-bettors staked certain sums of money on the chance whether the rain would fall or would not fall within a certain time. After making the bets, the parties betting would go to one of the stall-keepers, and get him to register the particulars of the bet in a book kept for the purpose, and each deposited with the stall-keeper the amount staked.

The bets as to rain falling were determined by persons at the place seeing the rain falling in a stream from such of the roofs of the adjoining houses as had been chosen by the bettors on making the bets, and seeing also the time, by the clock, if there was any doubt as to the time.

After the bet was determined, the winner received from the stall-keeper the amount of the stake.

Under these circumstances, the accused were charged before the Chief Presidency Magistrate with committing the offence of keeping a “common gaming house” under section 4, clauses (a), (b) and (c), of the Bombay Gambling Act IV of 1887 as amended by Act I of 1890.

On a reference by the Magistrate under section 432 of the Code of Criminal Procedure (Act X of 1882),

Held that to bring the place in question within the definition of a “common gaming house” in section 3 of the Bombay Gambling Act (IV of 1887) as amended by Bombay Act I of 1890, the instrument of gaming or wagering must be in the place itself, either kept there, or brought there and used there, for profit and gain. It is not sufficient that wagers are made in the place upon or by means of some article or other which is outside the place. The roofs of the houses surrounding the place in question could not, therefore, be regarded “as instruments of gaming either kept or used there” in the meaning of s. 3 of the Act.

Held, also, that the word “used” in s. 3 of the Act as amended by Act I of 1890 must be taken, in its ordinary sense, as meaning actually used. Any article which is in fact used as a means of wagering comes within the definition of “an instrument of gaming,” even though it may not have been specially devised or intended for that purpose.

[1892] *Held*, per TELANG, J., that neither the stalls, nor the books in which the bets were registered, nor the money staked and deposited with the stall-keeper, were instruments of gaming or wagering.

THIS was a reference, under section 432 of the Code of Criminal Procedure (Act X of 1882), by C. P. COOPER, Chief Presidency Magistrate:

* Criminal Reference, No. 80 of 1892.

The reference was in the following terms:—

"2. The accused were charged before me on the 3rd of August 1892, with committing an offence on and prior to the 13th day of July 1892, at Bombay under paragraphs *a*, *b* and *c* of section 4 of Bombay Act IV of 1887 and Bombay Act I of 1890.

"3. They denied having committed the offence.

"4. The facts proved are that the accused, who are the nominees of certain persons, in the month of June last rented a place at the Cathedral Road, Bhuleshwar, from one Purshotamdas Hurkissondas for two months at Rs. 250 a month, and the next two months they should continue to occupy at Rs. 400 a month.

"5. The accused took possession of the place, and afterwards caused to be erected on part of it a shed in which were eleven '*peethis*' or stalls, and also placed in a prominent position in about the centre of the shed an ordinary American clock which kept accurate time. The clock was kept in charge of *ramushis* appointed by the accused to prevent persons tampering with it.

"6. The stalls were let out to certain persons by the accused, at the rent of Rs. 100 each stall per month. The accused had the care and the management of the place, which was used by numbers of persons for the purpose of rain-betting, the place being kept open for any one who liked to go there.

"7. Surrounding the place are several roofs of adjoining houses, the rain from one of which fell into the place.

"8. That persons making bets on the rainfall ventured certain sums of money against each other upon the chance whether rain would fall, or would not fall, within a certain time. The time was not for a less period than three hours, and might be for a longer period during the time from 6 A. M. to 6 P. M. of each day.

[186] "9. After the bets were made the parties betting would go to one of the stall-keepers, and get him to register the particulars of the bet in a book kept and used by him for that purpose alone, and in most cases each of the parties would deposit with the stall-holder the money ventured (the stakes).

"10. The bets were determined as to rain falling by persons at the place seeing the rain falling in a stream from such of the roofs of the surrounding houses as had been chosen by the individual betters on making the bets, and the time by the clock if it was necessary, but in case of no doubt without reference to the clock.

"11. After the bet was determined the winner received from the stall-keeper, whether the loser was present and consented or not, the amounts staked, less two pice a rupee deducted by the stall-keeper as his commission from the amount won.

"12. No business, except rain-betting, was carried on in the shed:

"13. The clock in the shed could be looked at and used by the persons frequenting the place for other purposes besides those of determining the time in respect of the betting, and the evidence proved it was so used.

"14. A plan of the premises and the clock is forwarded herewith.

"15. Mr. Little on behalf of the prosecution contended that the place was used for the purpose of a common gaming house within the meaning of section 3 of the Act, and the clock, the roofs of the adjoining houses, the stakes or deposits of money, and the books are each of them an article used in the place as a subject or means of gaming, including wagering, and referred to the case

of *Queen-Empress v. Govind*, I. L. R. 16 Bom., 283, and particularly to the judgment of the Honourable Justices BIRDWOOD and PARSONS.

"16. Mr. Inverarity on behalf of the accused contended it was necessary, before convicting under section 4, to prove that the place was used as a common gaming house under section 3; that all instruments or articles used for gaming or wagering [187] kept or used for the profit or gain of persons using or keeping the place must be those specially devised or intended for that purpose; that under the Act the Court had the power to order the destruction of instruments of gaming; that the point really for decision is referred to by the Honourable Mr Justice JARDINE in the case of *Queen-Empress v. Govind*, what are 'instruments of gaming,' then to consider if any of these articles, which are kept or used on the premises, come under the definition, and what is really meant by 'means of wagering.' He contended that the roofs were not instruments of gaming; that it was clear these roofs are only the ordinary roofs of surrounding buildings, though the roof of the adjoining chawl, which belongs to other persons, projects a few inches over the place.

"17. He maintained it could not be contended that these roofs are used in the place, and that in any event they are not instruments of gaming or wagering.

"18. As to the stakes, that is covered by the decision in *Queen-Empress v. Govind*.

"19. The books of account are covered by the case of *Tollett v. Thompson*, L. R., 6 Q. B., 514.

"20. As to the clock, there was no attempt to make out there was anything peculiar about it, that it was used only in connection with the betting on certain occasions, and at other times by the persons frequenting the place for other purposes.

"21. There was no evidence to show that any one is bound by the entries made in the books, and he contended that in any event none of these things are instruments of wagering within the Act.

"22. As to the word 'used' it does not mean actual usage therefrom. Under the section it is meant to be understood that anything that assists in the smallest degree in making or ending a bet is an instrument of gaming; but instruments that are actually used for wagering, which is something actually made for that purpose, or something devised for it.

[188]"23. In England, they have a special legislation for betting houses, which we have not here, and he referred to the English Acts relating to betting houses.

"24. The questions for the opinion of the High Court are —

"(1) Whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of section 3 of Bombay Act IV of 1887, as amended; and

"(2) Whether any of the articles, viz., the clock, the money staked, the 'pedhis' or stalls, the books on the roof of the adjoining houses, were instruments used as subjects or means of gaming, including wagering, within the meaning of section 3 of the said Act."

• *Lang*, (Acting Advocate-General), for the Crown:—The accused have rented the place simply for the purpose of carrying on rain-betting. They have put up a clock there, not with the object of seeing the time of the day, but of deciding the bets by it. Bets are laid and deposited with the stakeholder. There are books kept in which the bets are registered. I contend that the clock

is used as a means of gaming. So, too, the roofs of adjoining houses were used as means of gaming.

[PARSONS, J. :—Then you might as well contend that the rain was used in the building.]

So I do. The rain from one of the adjoining roofs fell into the place. The word "used" in section 3 of Bombay Act IV of 1887 means actually used, and it must be given full effect to. No inference can be drawn from section 8 of the Act, which empowers a Magistrate to destroy the articles used as instruments of gaming after a conviction. The section is permissive. The ruling in *Queen-Empress v. Govind*, 1. L. R., 16 Bom., 283, does not conflict with this view.

Inverarity for the Accused :—If the Legislature had intended to stop betting, it would have passed an Act for that purpose. Stat. 16 and 17 Vict., c. 119, expressly brings a betting house within the statutory definition of a gaming house. See also 36 and 37 Vict., c. 38. Refers to Encyclopædia Britannica, [189] title "Game." The mere keeping of a common betting house is not criminal in India as it is in England. There is nothing illegal in persons meeting together in a particular place for rain-betting. The expression "instrument of gaming" no doubt includes means of gaming. The two words are convertible terms, as shown in Webster's Dictionary. But that definition does not apply to the clock used in the present case. The bets are not made with reference to the clock; they are made with reference to the time. They are not determined by the clock. The clock is, therefore, not an instrument or a means of wagering. The wager is independent of the clock. An instrument of gaming is an instrument specially devised for the purpose of gaming—*Imperatrix v. Vithal*, 1. L. R., 6 Bom., 19; *Queen-Empress v. Narotumdas*, 1. L. R., 13 Bom., 681; *Queen-Empress v. Govind*, 1. L. R., 16 Bom., 283; *Reg. v. Rama*, Bom. H. C. Cr. Rul. dated 19th June 1873; *Imperatrix v. Mahomed*, Bom. H. C. Cr. Rul., No. 72 of 1886.

These cases show that an instrument of gaming is an instrument specially devised or intended for the purpose of gaming. The words "other instrument of gaming" in section 3 of Bombay Act IV of 1887 mean other instrument *ejusdem generis*. The clock is not, therefore, an instrument of wagering. The wager is independent of the clock. It is a convenient thing in a place of public resort. As to the roof of the adjoining house, the definition of the word "instrument" in the Act shows that it is some tangible, moveable article; it does not include immoveable property. The roof is not a tangible moveable article, and, therefore, is not an instrument of wagering. The word "used" in the definition of *instruments of gaming* as given in Bombay Act I of 1890 is not a word of wide import. It means not actually used, but ordinarily used. The stakes or coins are not instruments of gaming.

Lang, in reply :—The cases cited were decided before the amending Act I of 1890 was passed. The definition of "instruments of gaming" given in this Act is very wide, and includes any and every article which is used as a means of gaming.

[PARSONS, J. :—What do you mean by "used" ?]

[190] I mean actually used as an instrument or means of gaming. The clock is used for the purpose of wagering. The bets were to be decided by the

clock in case of doubt. The object of putting up the clock on the premises was for the purpose of deciding the bets. It is immaterial if the clock is used by people for other purposes. As to stakes, it is idle to say that stakes are not the subject of wager. The roof is also used for purposes of gaming.

[TELANG, J. :—Is the roof an "article" ?]

Lang :—The word "article" means "thing." The roof is used for the purpose of deciding bets. People stand on the premises and make use of the adjoining roof for determining the bets. If a house be kept for betting on a subject however distant, it falls within the definition of a common gaming house.

Cur. adv. vult.

Parsons, J. :—Since the hearing of the arguments in this case my learned colleague and myself have consulted together and have arrived at a unanimous conclusion on the points of law involved and upon the terms of the order to be passed on the reference. We have decided to deliver separate judgments, considering the importance of the subject and for its better elucidation.

The Chief Presidency Magistrate has referred to this Court the following questions :—Firstly, whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of section 3 of Bombay Act IV of 1887 as amended ; and, secondly, whether any of the articles, viz., the clock, the money staked, the *pedhis* or stalls, the books, or the roofs of the adjoining houses, were instruments used as subjects and means of gaming, including wagering, within the meaning of section 3 of the said Act. His reference shows that the place in question is used as a common betting house for the profit of the occupant. Since gaming, by the provisions of Bombay Act I of 1890, includes wagering, the place will be a common gaming house if cards, dice, tables or other instruments of gaming or wagering are kept or used therein (see section 3 of the Bombay Prevention of Gambling Act IV of 1887).

[191] The expression instruments of gaming or wagering is by Bombay Act I of 1890 made to include any article used as a subject or means of gaming or wagering. The point, therefore, narrows itself to this "—Is any article used as a subject or means of wagering kept or used in the place in question ?" The Advocate-General on behalf of the Crown contended that the word "used" where it first occurs in the above sentence, which is taken from the definition given in Bombay Act I of 1890, means actually used. Mr. Inverarity for the accused argued that the word must be confined to things that are specially devised and intended to be used for the purpose of wagering, and he cited cases and the opinion of JARDINE, J., in *Queen-Empress v. Govind*, I. L. R., 16 Bom., 283, in support of his contention. After a full consideration of his argument, and of the authorities he cited, I can come to no other conclusion than that the word "used" must be understood in its ordinary meaning, and that it refers to an actual user ; in other words, I am of opinion that any article that is made use of as a subject or means of wagering, no matter of what nature, that article may be, comes within the definition of instruments of gaming or wagering. I see nothing in section 3 that is opposed to this view, for the power to order the destruction of articles found in a common gaming house is permissive only, and a Magistrate would only order the destruction of what properly ought to be and could be destroyed. There is no indication in the Act of 1890 of any intention to restrict the meaning of the word "used", and it is

almost impossible, considering the decisions, to suppose that the Legislature, had it intended the articles to be limited, would not have plainly so provided when it passed the Act. Whether or not an article is used as a subject or means of gaming or wagering, is a question of fact which has to be determined upon the evidence in each case. It is not a point that I would be willing to consider in a reference of this kind, since in case of a conviction there would be an appeal open to the accused in which the propriety of the finding could be called in question.

The above would, I consider, have been a sufficient reply to the reference were it not for the mention of the roofs of the adjoining [192]ing houses in it and for the arguments of the Advocate-General thereon. This requires us to determine the legal meaning of the words "kept or used in the place in question" which occur at the end of the point before raised, and which are taken from section 3 of the principal Act. The roofs of the adjoining houses clearly are not kept in the place in question. But the Advocate-General contends that they are used therein, since they are made use of for the purpose of wagering therein. If this argument is sound, then it would have been far simpler to have proceeded against the accused for the use of the rain itself, since that admittedly was used as the subject of wagering within the place. The whole of the bets were laid on or against the fall of the rain. I am unable, however, in any way to accept the argument. I think that, to bring the place within the section, the instrument of wagering must be in the place itself, either kept there or brought there, and used there for profit or gain, and that it is not sufficient that wagers are made in the place upon or by means of some article or other which is outside the place. To hold otherwise would be, I think, to do violence to the language of the section, while it would be inconsistent with the provisions of sections 5 to 8. The roofs of the adjoining houses must, therefore, be excluded from the list of articles that are in law capable of being used in this place as a subject or means of wagering.

The only other article that is relied on in argument as coming within the definition is the clock. That under the Act would be an instrument of wagering if it was used as a subject or means of wagering; if, for instance, wagers were made depending upon, or to be decided by, the time kept by it, it would, I think, be used as a means of wagering. This, however, as I have before said, is a question of fact upon which I am unwilling even to express an opinion, as the point may come before us in another form. Even if I were willing, I could not do so in the present reference, since we have not got the evidence, and the Magistrate has not himself found upon the point. All he says is that the clock kept accurate time and was watched by *ramushis*, and that bets were decided by persons seeing the time by the clock if necessary, but in cases of no doubt without reference to the clock. I cannot infer from [193] this that bets were made and decided by the time kept by this clock, which is apparently what would have to be proved in order to make it an instrument of wagering.

The order of the Court is that the reference be returned to the Chief Presidency Magistrate with the following answers, *viz.*, (1) In the affirmative only if any article is kept or used in the place as a subject or means of wagering. (2) With the exception of the roofs of the adjoining houses, which are not within the place, any one of the articles mentioned might be an instrument of wagering if it is within the place and actually kept or made use of in the place as a subject or means of wagering, but not otherwise.

The Magistrate should complete the trial of the case in accordance with the above answers. The costs of this reference are to be paid by the accused if

they are ultimately convicted, but by the Crown if the result of the prosecution is an acquittal.

Telang, J. :— This case comes before the Court on a reference made by the Chief Presidency Magistrate under section 432 of the Code of Criminal Procedure. The questions referred are as follows:—

(1) Whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of section 3 of Bombay Act IV of 1887 as amended? and

(2) whether any of the articles, *viz.*, the clock, the money staked, the "pedhis" or stalls, the books or the roofs of the adjoining houses, were instruments used as subjects and means of gaming, including wagering, within the meaning of section 3 of the said Act?

The answer to the second of these questions decides the answer to be given to the first, and the argument before us has been consequently directed to the elucidation of the point, whether any of the specific articles mentioned in the second question, and chiefly the clock, the money staked, and the roofs, are or are not instruments or subjects or means of wagering within the meaning of section 3 of Bombay Act IV of 1887, interpreted by the light of Bombay Act I of 1890. I will first deal with the "articles" [194] which did not form the subject of argument, *viz.*, the "pedhis" or stalls, and the books. I am of opinion that, having regard to the statements in the case referred, neither of them can be held to fall within the purview of the Gambling Acts. The stall is the seat or office, so to say, of the man who keeps a register of the bets made, and the books are those in which the bets are registered. In my opinion, they are both too remotely connected with the wagering to be accurately described as either instruments or means or subjects of wagering. They appear to me, according to the statements in the case, to be merely helps to the preservation of evidence relating to the completed wagering transaction. As regards the money staked, I think it would be a straining of language to describe that as falling within the words instrument, or means, or even subject of the wager. It is rather the fruit or result of the wager, and falls outside the scope of the section. This view may be supported to some extent by the language of sections 5, 6 and 8, and is in accordance with the opinion expressed by JARDINE, J., in *Imperatrix v. Govind*, I. L. R., 16 Bom., 283.

The roofs of the neighbouring houses must next be considered. I do not think it to be necessary on the present occasion to decide whether, looking at the manner in which they are utilized for the purposes of these wagers as stated in the case, they are instruments or means or subjects of the wagers; or, again, whether they can be properly included under the term "articles" used in Bombay Act I of 1890. It seems to me enough to say that they are not "kept or used in" the place in question. They plainly are not kept there. And, having regard to the provisions of such sections as 6, 7 and 8, I am, to some extent, confirmed in the view I expressed during the argument, that the Legislature cannot have intended that tangible things should be treated as used in a place where they are not physically.

Lastly comes the clock. And, as regards the clock, I confess I have felt considerable doubt. The doubt is, partly at least, due to the circumstance that the facts stated in the case do not furnish sufficiently full and precise informa-

tion. Thus it is not quite clear from the case whether, in point of fact, the clock has [195] ever been consulted at any stage of any of the wagering transactions entered into on the premises in question. All that the Magistrate states is that "the bets were determined as to rain falling by persons at the place seeing the rain falling in a stream from such of the roofs of the surrounding houses as had been chosen by the individual betters on making the bets, and the time by the clock if it was necessary, but, in cases of no doubt, without reference to the clock." This is not quite precise. Again, this statement does not make it clear whether the "determination" as to the time was made by the parties to the bet referring to the clock or by "the persons at the place" doing so, or whether it was the stakholder, who, in order to deal with the alleged winner's application for the stakes, satisfied himself by such a reference. It may be, I say no more at present, that different results may follow in the different cases.

It is true that, if Mr. Inverarity's argument is correct to its full extent, these points will be all immaterial. He contends that the interpretation of the phrase "instruments of gaming" in *Watson v. Martin*, 34 L. J. M. C., 50, and other authorities adopted by this Court in more than one ruling is still good in spite of Bombay Act I of 1890. This certainly appears to have been the opinion of JARDINE, J. But, I own, I find it difficult to concur in that opinion. *Prima facie*, I should say that the very fact that the Legislature, having all these authorities before it, lays down a fresh interpretation of the phrase "instruments of gaming" affords by itself an indication that some enlargement of the scope of the words was intended. And, secondly, I think that the word "means" is a word with a wider signification than was given to the word "instrument" by the judicial decisions which have been alluded to. Taking the phrase "means of wagering" in its ordinary idiomatic sense, I should say that it might fairly be regarded as somewhat wider than the phrase "instruments of wagering." And when the former phrase is added by express separate legislation to the definition of the latter, it seems to me difficult to avoid the inference that some widening of the scope of the old law must have been intended. The considerations [196] which would be applicable in interpreting a statute, in which both the words "instrument" and "means" occurred together, would not necessarily apply where "instruments" being the sole word used in the first statute an amending statute was subsequently passed to add the word "means." It seems to me, therefore, that we cannot now hold ourselves bound by the older authorities referred to in the case of *Queen-Empress v. Govind*, I. L. R., 16 Bom., 283. And, looking at the question apart from those authorities, I think we must come to the conclusion that a thing may be an "instrument or means" of gaming or wagering, although not "devised or intended for that purpose," or "primarily used for that purpose," or "destined for that purpose," or "proved to have no other use," in the sense in which these various phrases have been employed in the authorities touching this point. It seems to me that, looking, as we are bound to do, at the course of legislation on this subject, we ought to hold that any article which is in fact used as a means of wagering must be held to be within the definition, even though it may also serve some other purpose or purposes. This construction, it will be noticed, is not open to the observations made by MELLOR, J., in *Tollet v. Thomas*, L. R., 6 Q. B., 514, that if half-pence are instruments of gaming, then we all carry these dangerous instruments. All do not use half-pence, in fact, as means of gaming or wagering, and in so far as they do, I do not know why under our Acts they should not be held to carry dangerous instruments. Nor do I think that section 8 is in any way opposed to that view. I doubt whether, according to the decision in *Julius v. Bishop of Oxford*, 5 Ap. Cas., 214, the section ought to be construed

as obligatory, as argued by Mr. Inverarity. But, even if it were so construed, I am not at all sure that the inconvenient and alarming consequences indicated by Mr. Inverarity would necessarily and unavoidably follow.

I ought, perhaps, to notice one other point. Mr. Inverarity cited Webster's Dictionary to show that the words "instrument" and "means" are convertible terms. Conceding that, I venture to think that the conclusion above expressed is nevertheless not vitiated, because I think it clearly fallacious to argue that as [197] means is convertible with instrument, and instrument is by judicial decision interpreted in a limited sense in certain Acts, therefore means also must necessarily bear the same limited construction in other Acts, even although these other Acts are *in pari materia*. I have already shown grounds for adopting a different mode of interpretation. And here I will only add, that it appears to me that instrument and means are convertible and co-extensive, according to Webster, only when the sense of the two words is taken generally, and not limited, as it is in *Watson v. Martin*, 34 L. J. M. C., 50, and other cases of that class.

The result is that, in my opinion, the clock here in question, although, of course, it may be, and, as stated in the case, is utilized, as it certainly is capable of being utilized, for other purposes, may nevertheless, in point of law, be also used as an instrument or means of wagering within the meaning of the Prevention of Gambling Acts. Whether it is in point of fact so used, is a matter on which we cannot properly give an opinion under section 432 of the Criminal Procedure Code.

I, therefore, agree with Mr. Justice PARSONS in thinking that the Chief Presidency Magistrate must be left to come to his own finding, on the evidence before him, as to the questions of fact, and then decide whether the conditions laid down in section 3 of the Act are satisfied, having regard to the interpretation of the conditions which we have now stated.

NOTES.

[This was approved in (1902) 26 Bom., 563 (books) ; (1903) 28 Bom., 129.]

[17 Bom. 197]

ORIGINAL CIVIL.

The 30th September, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR JUSTICE BAYLEY.

The Bombay Burmah Trading Corporation, Limited.....(Original

Defendants) Appellants

versus

F. Yorke Smith.....(Original Plaintiff) Respondent.*

Company—Shareholder—Executor, or administrator of a shareholder, rights of—"Holding a share," meaning of—Agreement—Construction—Declaratory decree—Specific Relief Act (I of 1877), Sec. 42—Objection taken for first time in appeal—Practice—Procedure.

Prior to the year 1863 W. Wallace carried on an extensive timber trade in Burmah. In that year the defendant company was formed for the purpose of [198] taking over the

Suit, No. 249 of 1890.

business from him together with the capital and assets engaged therein. The nominal capital of the company was Rs. 25,00,000 divided into one thousand shares of Rs. 2,500 each. On the 22nd July 1864, an agreement carrying out the above object was executed between W. Wallace and the defendant company. This agreement set forth the assets and property to be transferred, and classified them as (a) "fixed assets," which consisted of immoveable property, buildings, &c., valued at Rs. 2,76,000, or thereabouts; and (b) assets other than fixed assets which consisted of what were called "forest operations," and of valuable contracts, rights and concessions from the King of Burmah, &c. The agreement further specified the consideration to be paid to W. Wallace for each of these classes of assets. For the "fixed assets" he was (under the 12th clause of the agreement) to receive one hundred fully paid up shares of the company. That clause contained certain provisions as to the payment of the ordinary dividend upon those shares, and concluded with a provision that the directors of the company should not be bound to consent to or to recognize as valid any assignment made by W. Wallace, his executors or administrators of the shares, or any of them, within five years from the date of the registration of the company.

For the remaining assets it was provided by the 13th clause of the agreement that W. Wallace, his executors, or administrators, should be entitled, so long as he or they should hold the hundred shares, to an extra or preferential dividend, payable out of such surplus net profits as might remain in any year after paying a dividend of twelve per cent. on all the shares of the company including the said hundred shares and after setting apart an amount (left to the discretion of the directors) for the reserve fund. The said extra or preferential dividend was to be one-third of such surplus net profits. The said 13th clause also provided that if W. Wallace died within the above stated period of five years, his executors or administrators should not be entitled to the said extra or preferential dividend after the expiration of the said period, notwithstanding that they might continue to hold the said shares.

Subsequently to the execution of this agreement the business and assets were transferred to the company by W. Wallace, and one hundred fully paid up shares were duly allotted to him under clause 12, and his name was entered on the register of shareholders. In 1888, W. Wallace, then domiciled in England, died. By his will he appointed his three brothers—R. Wallace, L. A. Wallace and A. F. Wallace—his executors, and he directed that his executors should hold the said shares and all his interest therein and attached to the holding thereof upon trust for such of his said brothers as might survive him, if more than one, as joint tenants. R. Wallace died in the testator's life-time, and only A. F. Wallace proved the will. On the 27th September 1888, letters of administration with the will annexed was granted by the High Court of Bombay to the plaintiff in this suit (F. Yorke Smith) as attorney for the said executor A. F. Wallace. On the 29th September 1888, the said letters of administration were produced to and registered with the defendant company. The hundred shares continued to stand in the testator's name in the register of shareholders. In a parallel column in the register, under the heading "remarks," the following entry was made:— "Administration in India to the estate of W. Wallace has been granted to [199] Mr. Frederick Yorke Smith as attorney for W. A. F. Wallace." Save for this entry the register remained unaltered after the testator's death.

The plaintiff now sued to have it declared that clause 13 of the agreement was still in operation, and that as such administrator as aforesaid he was entitled to the extra or preferential dividend payable on the said hundred shares if and when there should be sufficient net profits to allow payments thereof under the said clause. The company disputed the plaintiff's claim. They contended that A. F. Wallace, the proving executor of the testator's will, had ceased to hold the shares as executor, and was holding them as trustee under the specific bequest in the will and that he was only entitled to the preferential dividends, if at the time when such dividends were declared he was holding the shares in the capacity of executor and as an undistributed part of the testator's estate. They insisted that the plaintiff should prove that he so held the shares before he could be entitled to the declaration sought for. The executor was examined in England on commission. He deposed

that the estate had been got in, and the debts paid; that the estate had not been divided, because it would not be in accordance with the private wishes of the testator, which they (i.e. he and his brother L. A. Wallace) were aware of; that, apart from these private wishes, there was no reason why the estate should not be divided between his brother and himself.

Held, by **BARBAN, J.**, and by the Court of Appeal, that the plaintiff was entitled to the declaration sought for. The executor or his attorney (the plaintiff) was still the registered holder of the shares, and under clause 13 of the agreement it was intended that W. Wallace, his executors or administrators should be entitled to the extra dividend so long as he or they should be the registered holder or holders of the shares, without reference to the beneficial interest therein. There was nothing to be found in the agreement, express or implied, showing the intention of the parties to regard anything but the legal holding, and to go beyond that holding would virtually be to add a new term to the agreement.

In appeal, the defendants contended that the Court would not make a declaratory decree with regard to a right which (as in the present case) was future and contingent, there being no fund actually in existence when the suit was brought, from which a preferential dividend could be claimed, and no certainty that there ever would be such a fund.

Held, by the Court of Appeal, that the present case was one in which in the interests of both parties the Court, in the exercise of a sound discretion, should make a declaration as to the right in question. The right was existent, and although the exercise of it was undoubtedly contingent on there being a balance of profits as contemplated by clause 13 of the agreement, the very nature of the agreement assumed that there might and probably would be such a balance, and a large sum had been already applied towards the dividend in question. Further, it was intended that the directors should exercise their discretion as to the amount to be carried to the reserve fund upon which the balance of profit available for the preferential dividend depended. It was, therefore, from the very nature of the case, important that the directors should know for certain whether the right to a preferential dividend was still in existence as contended by the plaintiff, [200] or had come to an end. The circumstance, moreover, that the objection had been taken for the first time on appeal would by itself be fatal to it.

THE plaintiff (respondent) was the administrator with copy of the will annexed in India, of the estate of one William Wallace, who died on 28th January 1888.

For some years previous to the year 1863, the said William Wallace had carried on an extensive timber trade, in its various branches, at Rangoon and other places in Burmah: the firm of Wallace and Co., of Bombay, acting as his agents in Bombay in that business.

In the year 1863 the defendant company was formed and registered under Act XIX of 1857 for the purpose of taking over the said trade and business and the capital and assets of the said William Wallace engaged therein.

By the clauses and articles of association of the company, Wallace and Co. of Bombay, were to be the secretaries and treasurers. The nominal capital of the company was Rs. 25,00,000, divided into one thousand shares of Rs. 2,500 each.

On the 22nd July 1864, an agreement carrying out the above object was executed between the defendant company and the said William Wallace. The agreement stated the formation of the company and its objects, and set forth the various property and assets of which the said William Wallace was possessed, or to which he was entitled in connection with his trade in Burmah. Part of the assets were referred to in the agreement as "fixed assets," and consisted of immoveable property, buildings, &c., which were valued at Rs. 2,76,000, or thereabouts. The remainder consisted of what were termed "forest operations" in Burmah and of certain valuable contracts and certain valuable rights or permits from the Government of India and from the King of Burmah, &c.

The agreement specified the consideration to be paid to W. Wallace for both the above classes of assets which were to be taken over from him by the company. For the "fixed assets" he was to receive (as provided by the 12th clause of the agree-[201]ment) one hundred fully paid up shares in the company. The said clause contained certain provisions with respect to the ordinary dividend to which he was to be entitled in respect of these shares, and concluded with a provision that the directors of the company should not be bound to consent to or to recognize as valid, any assignment made by William Wallace, his executors or administrators of the shares, or any of them, within five years from the date of the registration of the company. The said twelfth clause was as follows:—

" 12. In consideration of the transfer, by the said William Wallace to the company, of the said fixed assets, the said William Wallace, his executors or administrators shall be entitled to have allotted to him or them one hundred shares in the said company, of rupees two thousand and five hundred each, the whole amount of which shall be deemed to have been paid up; but the said William Wallace, his executors, administrators or assigns shall not be entitled, in respect of such one hundred shares or any of them, to participation of any dividend which may be declared in respect of profits up to the thirty-first day of May one thousand eight hundred and sixty-four, nor shall he or they at any time be entitled to any dividend in respect of the same one hundred shares respectively, save in respect of so much of them respectively as in respect of any other one hundred shares of the same amount in the said company respectively shall for the time being have been actually called up and become due to the said company respectively, but from and after the thirty-first day of May 1864, the company shall pay to the said William Wallace, his executors, administrators or assigns interest at the rate of seven and half per cent per annum on the difference for the time being between the amount of the one hundred shares so allotted and the amount actually for the time being called up and become due in respect of any other one hundred shares of like amount in the said company, provided that, in the event of the said company increasing their capital before calling up the full amount of the original shares, then and in such case the interest to be paid to the said William Wallace on the uncalled amount of such shares shall, if the rate of dividend paid in any year on any class of shares shall exceed seven and a half per cent., be equal to the rate of such dividend in addition to the said one hundred shares so to be allotted to the said William Wallace, the said company shall be liable to pay to him, his executors or administrators the amount of the sums expended by him or on his account since the beginning of the month of February 1864, in, or upon the erection of engineers' and other dwelling-houses and offices or otherwise in or upon the improvement of the said fixed assets or any part thereof, and the amount so become payable as last aforesaid shall be deemed to have accrued due on the thirty-first day of May 1864, provided always that the said company or directors shall not be bound to give their consent to, or in any way to recognize as valid any assignment which the said William Wallace, his executors or administrators may have made or purported to make of the said one hundred shares, or any of them, during a period of five years from the date of registration of the company."

[202] The thirteenth clause of the agreement stated the consideration payable in respect of the assets other than the "fixed assets," and certain specified timber and live stock. For these assets it provided that William Wallace, his executors or administrators should be entitled, as long as he or they should hold the hundred shares, to an extra or preferential dividend payable out of such surplus net profits as might remain in any year after paying a dividend of twelve per cent. on all shares of the company including the said hundred shares and after setting apart an amount (which was left to the discretion of the directors) for the reserve fund. The said extra or preferential dividend was to be one-third of such surplus net profits, and, in addition, William Wallace, his executors, administrators and assigns were to share *pari passu* with the

other shareholders in the remaining two-thirds of such surplus net profits, &c. The clause concluded by providing that, if William Wallace, died within the above stated period of five years, his executors or administrators should not be entitled to the said extra or preferential dividend after the expiration of the said period, notwithstanding they might continue to hold the said shares. The said thirteenth clause was as follows :—

"13. In consideration of the transfer by the said William Wallace to the company of the premises hereby agreed to be transferred (other than the said fixed assets and other than the premises mentioned in the clauses six, seven and nine), the said William Wallace, his executors or administrators shall be entitled, so long as he or they shall hold the said one hundred shares, to an extra or preferential dividend equal to one-third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of twelve per cent. per annum on the paid up amount of all shares in the company (including the said one hundred shares) and after setting apart from time to time out of such surplus profits as a reserve fund or to the credit of any reserve fund already created such sum as the directors of the company for the time being may in their discretion think fit, provided always that nothing herein contained shall operate to take away the right of the said William Wallace, his executors, administrators and assigns to share *pari passu* with other shareholders of the company in the remaining two-thirds of the said surplus net profits, and provided also that nothing herein contained shall operate to prevent the directors for the time being of the company from exercising, any such discretion as but for these presents they might have exercised in respect of setting apart profits as a reserve fund, or in respect of applying any reserve fund or any part of any reserve fund or any part of any reserve fund formed in any preceding year or years to the payment of any dividend or dividends for any succeeding year or years, but nevertheless any sum taken from the reserve fund for dividend shall be deemed to be [203] and form part of the income or profits of the company for all years in which it is taken, provided further and it is hereby agreed between the said parties that, in the event of death of the said William Wallace before the expiration of the said period of five years, his executors or administrators, notwithstanding they may continue to hold the said one hundred shares, shall not be entitled to the said extra or preferential dividend thereon after the expiration of the said period of five years."

In due course, after the execution of the said agreement, William Wallace transferred to the company the said "fixed assets" and other properties and rights agreed by him to be so transferred, and he performed all that was required to be done by him under the agreement, and one hundred fully paid up shares in the company, of Rs. 2,500 each, were allotted to him pursuant to clause 12 above set forth, and his name was duly entered in the register of shareholders of the corporation as the owner thereof.

Subsequently, *viz.*, in May 1866, the company, by a special resolution, adopted as one of the articles of association a clause whereby the various arrangements and agreements contained in the above agreement were approved and sanctioned by the company, and it was provided that the directors should at all times have full power to do all such acts and things and to enter into such engagements on the part of the company as might be necessary for the better and more effectually carrying out of the said arrangements and agreements.

On the 28th January 1888, William Wallace, then domiciled in England, died, having made his will, dated 25th May 1880. By this will he appointed his three brothers—Richard Wallace, Lewis A. Wallace and Alexander F. Wallace—his executors, and directed that his executors or administrators should hold the shares and all his interest therein and attached to the holding thereof in trust for such of themselves as should survive him, if more than one, as joint tenants.

The following was his will :—

"Whereas I am entitled to one hundred fully paid up shares in the Bombay Burmah Trading Corporation, Limited, which shares are standing in my name and so long as I or my executors or administrators shall hold the said shares, we are entitled to an extra or preferential dividend equal to one-third of the surplus net profits of the company as in the articles of association of the company and in the agreement therein referred to is more fully set forth. Now I hereby direct [204] that my executors or administrators shall hold those shares and all my interest therein and attached to the holding thereof upon trust for and so that the same shall be at the absolute disposal of such of my brothers Lewis Alexander Wallace, Richard Wallace and Alexander Falconer Wallace as shall survive me, if more than one, as joint tenants, and as to all the residue of my real and personal estate whatever and wheresoever to which I or any person or persons in trust for me may be entitled at the time of my decease I do hereby give, devise and bequeath the same unto such one or more of my brothers Richard Wallace, Lewis Alexander Wallace and Alexander Falconer Wallace as shall be living at the time of my decease, and if more than one in equal shares as tenants in common and not as joint tenants for his and their own absolute use and benefit, and as to all estates if any, vested in me upon trust or by way of mortgage I give the same to the said Lewis Alexander Wallace, Richard Wallace and Alexander Falconer Wallace, executors of this my will and I revoke all former or other testamentary writings by me at any time made."

One of the brothers (Richard) died in the lifetime of the testator, and only one (*viz.*, Alexander F. Wallace) of the two surviving brothers proved the will. He proved the will in England on the 5th June 1888.

Letters of administration with the will annexed were granted by the High Court of Bombay to the plaintiff, F. Yorke Smith, as attorney of the said Alexander F. Wallace, the executor on the 27th September 1888.

The letters of administration were on the 29th September 1888, produced to and registered with the company, and the hundred shares in the company which had been originally allotted, as above mentioned, to William Wallace continued to stand in his name in the register of shareholders. In a parallel column in the register, under the heading "Remarks," the following entry was made:—"Administration in India to the estate of William Wallace has been granted to Mr. Frederick Yorke Smith as attorney for Mr. A. F. Wallace. Save for this entry the register remained unaltered after Mr. Wallace's death."

The following clauses in the articles of association of the defendant company provided for the devolution of shares on the death of a shareholder :—

"XXIX.—The executors or administrators of a deceased shareholder shall be the only persons recognized by the company as having any title to his share. But no person shall be recognized as executor, administrator, or representative, [205] of a deceased shareholder, but upon production of probate or letters of administration granted to such executor, administrator, or representative by the High Court of Judicature at Bombay.

"XXX.—Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the directors.

"XXXI.—Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any shareholder may, with the consent of the directors, instead of being registered himself, elect to have some person to be named by him and approved by the directors registered as a transferee of such share."

The plaint in this suit was filed on the 26th April 1890. The plaintiff claimed to be entitled, as administrator of William Wallace, to the extra or preferential dividend in respect of the hundred shares provided by clause 13 of the agreement.

The plaint, after stating the facts above set forth, continued :—

" 17. The plaintiff submits that under the circumstances hereinbefore appearing he is as such administrator aforesaid entitled to the extra or preferential dividend payable in respect of the said hundred shares under clause 13 of the said agreement if and when there shall be sufficient net profits to allow the payment thereof under that clause. The company, however, does not admit that he is so entitled, and suggests that that clause has now ceased to have any operation."

The prayer of the plaint was —

" that it may be declared that the said clause 13 is still in operation, and that the extra or preferential dividend payable on the said 100 shares provided for by clause 13 is still payable and is payable to the plaintiff as such administrator as aforesaid, if and when there shall be sufficient net profits to allow the payment thereof under that clause."

The defendant company disputed the claim of the plaintiff. They filed a written statement as follows :—

" The defendants believe that, in the events which have happened, Alexander Falconer Wallace in the plaint named as proving executor of the will of William Wallace, deceased, now holds the shares in the plaint referred to in the character of trustee of the same as specifically bequeathed by the said will, and not in the character of executor.

" [206] " 2. The defendants submit that the plaintiff is entitled to the preferential dividends in the plaint referred to, upon the assumption only that the said shares shall, when such dividends may be declared, be held by the executor of the said testator in the capacity of executor and as an undistributed part of the testator's estate, and not otherwise.

" 3. The defendants claim that the plaintiff must prove that the said shares are so held as in the last paragraph stated before he can be entitled to the declaration sought in this suit."

The executor (A. F. Wallace), was examined on commission in London as a witness for the defendants on the 23rd November 1891. He deposed (*inter alia*) as follows :—

" All the estate in England of the testator has been got in for some time and is now represented by money lodged with my firm as bankers. All the debts of the estate were paid as they came in; the only outstanding one, that I am aware of, is that for legal expenses connected with the present proceedings. I personally and my brother Lewis Alexander are, under the terms of the will, absolutely entitled, but we are in possession of private instructions or rather private knowledge as to the wishes of the testator. The estate has not been divided, because it would not be according to the private wishes of the testator which we are aware of, and which concern the interest of minors. These private wishes had nothing to do with the dividends on the 100 shares, or with the right to those dividends. Apart from these private wishes there is no reason why the estate should not be divided between myself and my brother. I cannot name a time at present at which the account will be closed, and the estate distributed, in accordance with the testator's wishes. By virtue of these wishes I and my brother consider ourselves trustees for certain persons, with discretion as to the selection of the objects. These persons are now in existence. We have not exercised our discretion in any binding way among them."

At the hearing, counsel for the defendants raised the following issues :—

1. Whether Alexander F. Wallace now holds the shares referred to as trustee for the specific legatee or as executor of the testator?

2. Whether clause 13 of the agreement referred to in the pleadings is still in operation?

3. What is the proper construction of the said clause?

4. Whether the plaintiff is entitled to the relief claimed, or to any and what part thereof?

Counsel for the plaintiff raised—

5. Whether the defendants are entitled to raise the question raised in the first issue?

[207] *Kirkpatrick* (Scott with him), for Plaintiff:—The administration is still open, and the executor is entitled to the extra dividend payable under clause 13 of the agreement. So long as there is an executor, and until the shares are actually transferred, the executor, as representing the estate, can take the dividend. There is no limit of time as to the obligations imposed on the executor by the agreement (see clauses 4 and 10 of the agreement* and see also article 145 of the Articles of Association †), and, if the executor is still liable to the burdens, he is still entitled to the benefit. The concluding words of clause 13 set forth the only case in which the executor is not to get the dividend. The benefit of the agreement was clearly not limited to the life of Wallace, for it was to go to his executors. The holder meant in the agreement is not necessarily a beneficial holder, for under it executors may hold, and executors do not hold beneficially.

The estate is the real holder of the shares through its representative the executor. See Buckley on Companies, (6th Ed.), notes [208] to section 76, p. 204, and notes to article 12, Table A p. 461. Once a holder of shares is duly registered he continues to be the holder until he executes a transfer of the shares. No transfer of those shares has been executed, and the register is unaltered. As to the position of executors, see *Buchan's case*, 4 Ap. Ca. at pp. 595, 596. The defendants contend that under the agreement the executor must hold as executor, but that here he now holds as trustee. But the register does not and cannot show that he holds as trustee (secs. 53 and 126 of the Indian Companies Act VI of 1882), and it is from the register alone that the holder is ascertained. The company cannot raise any question as to the capacity in which the person on the register holds. They cannot call on the executor to show that he is not a trustee. He may be a trustee, but that does not concern the company. It is bound by its register—Buckley on Companies, (6th Ed.), p. 88; *Pulbrook v. Richmond Consolidated Mining Co.*, 3 Ch. D., 610; *Ex parte Bugg*, 2 Dr. and Sm., 452; *In re Perkins*, 24 Q. B. D., 613; *Turquand v. Kirby*, L. R., 4 Eq., 123; *Pender v. Lushington*, 6 Ch. D., 70. The company could still regard the estate as holder of the shares, and enforce claims against it. If so, the estate has a right to the dividend—*Keene's Executors' case*, 3 D. M. and G., 272; *Ex parte Bulmer*, 33 L. J. (Ch.) 609; *Ex parte Gouthwaite*, 3 Mac. and

* (Clause 4).—Provided always that the said William Wallace, his heirs, executors and administrators shall and will at all times at the expense of the said company execute, do and take or cause to be executed, done and taken all such conveyances, assignments, acts, and proceedings as may be in his or their power, in order that the rights of him the said William Wallace under the said permits and grants and under the said contracts may be secured to and exercised and enjoyed by the said company, their successors and assigns.

(Clause 10).....the said William Wallace, his executors and administrators will do all things in his or their power to induce such persons to remain in the service of the said company and others to secure to the company and their successors the advantages and benefits of such good will.

† Article 145 of the Articles of Association.—The Directors shall have power, if they shall see fit so to do, to enter into any new agreement or agreements with or to be binding upon any assignee or assignees, transferee or transferees, of the said one hundred shares of the said William Wallace, or any of them, which may be assigned or transferred by the said William Wallace, before or after the expiration of the said five years with the consent of the Directors such as shall impose upon such assignee or assignees, transferee or transferees, the same liabilities and obligations towards the said Company as were undertaken by the said William Wallace, by and Indenture of the 24th day of July 1864, in all that relates to the said shares, and every such agreement as last aforesaid shall be binding on the parties, any clause or regulation herein contained to the contrary notwithstanding, as if the provisions thereof were by these regulations specially excepted or affirmed and approved.

G., 187. An executor may be also a trustee—Williams on Executors, (8th Ed.), p. 1804. As to the assent of executor, see Indian Succession Act (X of 1865), secs. 293, 295; Williams on Executors, (8th Ed.), pp. 1386—1388.

Latham, Advocate General (*Jardine* with him) for Defendants:—It is clear that the estate has been administered, and the duty of the executor is ended. He has ceased to hold as executor, and now holds as trustee and acts as such—Lewin on Trusts (9th Ed.), p. 204; Williams on Executors (8th Ed.), p. 1380. The shares ought to be transferred to those who are entitled to them under the will. Not to do so, but to allow the register to remain as it is for the purpose of claiming the dividend as executor, is really a fraud on clause 13 of the agreement. It could not have been intended that the extra dividend should be payable for ever to Wallace's estate. The agreement evidently intended that five[209] years' enjoyment of the extra dividend should satisfy Wallace's claim. For five years it secured that his interest and service should be given on behalf of the company. In clause 13 the word "hold," in the sentence "so long as they should hold the hundred shares," means holding as executors, not as trustees. The executor has clearly assented to the legacy of these shares, and it is no longer held as part of the general estate. *Ex parte Bulmer* has been relied on, but the authority of that case is now shaken. See *Bainbridge v. Smith*, 41 Ch. D., 462. A company may be affected by a trust. It cannot disregard equitable titles: see Buckley on Companies, (6th Ed.), p. 86 *et seq.*; *Binney v. Ince Hall Coal Co.*, 35 L. J. (Ch.), 363.

11th March, 1892. *Farran, J.*:—The plaint in this suit prays that it may be declared that clause 13 of a certain agreement of 22nd July 1864, made between William Wallace of the one part and A. F. Wallace and four other directors of the defendants' corporation on its behalf of the other part, is still in operation; and that the preferential dividends on the 100 shares referred to in the clause is still payable; and that it is payable to the plaintiff as administrator with the will annexed of the said William Wallace, now deceased.

The plaint does not ask for consequential relief. No objection has been taken by the defendants on that ground under section 42 of the Specific Relief Act, and as no fiscal regulation is contravened by the omission, I see no reason why the Court should raise the objection of its own motion.

From the recitals in the agreement, it appears that the defendants' corporation, originally called the Burmah Trading Company, Limited, was established in 1863 with the object of carrying on trade, and especially the timber trade, with Burmah and its neighbouring States, and, for that purpose, of acquiring and working forests in Burmah. Its secretaries, treasurers and managers were to be the firm of Messrs. Wallace and Co., of Bombay. That firm were the agents of William Wallace of Burmah. William Wallace, before the formation of the company, had been, and was at the date of the agreement, carrying on the [210] timber trade in Burmah; and the object of the agreement was that the company should take over the business and assets of William Wallace in Burmah as a going concern on terms equitable towards both parties.

The property of William Wallace in Burmah consisted partly of immoveable property, buildings, mills, works and machinery easily capable of valuation, which in the agreement were termed "fixed assets," and partly of assets upon which it was difficult to place a money valuation, such as concessions, and expected concessions from the King of Burmah and the Government of India, running contracts with natives of Burmah for cutting timber, the possession of a trained and organised staff, and generally the good will of a very peculiar

business depending largely for its successful working on the loyal co-operation of William Wallace with those who carried it on.

The earlier clauses of the agreement provide for William Wallace making over both classes of property to the company. Clauses 12 and 13 contain the consideration which Mr. Wallace was to receive from the company. Clause 12 provides that, in consideration of the transfer by William Wallace of his "fixed assets," he, his executors and administrators shall be entitled to have allotted to him or them 100 shares of the company, of Rs. 2,500 each, the whole amount of which shall be deemed to have been paid up. Then follow certain provisions regulating the payment of the ordinary dividend on the 100 shares, and the clause concludes as follows:—"Provided always that the company shall not be bound to give their consent to or in any way recognize as valid any assignment which the said William Wallace, his executors, or administrators may have made or purported to make of the said 100 shares or any of them during a period of five years from the date of the registration of the company." That proviso seems to me to be of importance when considering the interpretation to be put on the succeeding clause. It shows that, for some reason, the parties to the agreement considered it to be of importance to the company that not only William Wallace in his lifetime, but that his executors or administrators after his death, should not assign his shares; but [211] that his executors or administrators should hold his shares for some time. This must have been irrespective of the beneficial disposition which William Wallace should make of his shares. Then comes clause 13—"In consideration of the transfer by the said William Wallace to the company of the premises hereby agreed to be transferred" (other than the said fixed assets and other than the premises mentioned in clauses 6, 7 and 9, viz., certain timber and stores in hand) the said William Wallace, his executors or administrators shall be entitled, so long as he or they shall hold the said 100 shares, to an extra or preferential dividend, equal to one-third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of 12 per cent. per annum of the paid-up amount of all shares in the company (including the said 100 shares) and after setting apart from time to time, out of such surplus profits, as a reserve fund, or to the credit of any reserve fund already created, such as the directors of the company for the time being may in their discretion think fit. Provided always that nothing herein contained shall operate to take away the right of the said William Wallace, his executors, administrators and assigns to share *pari passu* with other shareholders of the company in the remaining two-thirds of the remaining surplus assets." Then follows another explanatory proviso, and the clause concludes:—"Provided, further, and it is hereby agreed between the said parties, that, in the event of the death of the said William Wallace before the expiration of the said period of five years, his executors or administrators, notwithstanding that they may continue to hold the said 100 shares, shall not be entitled to the said extra or preferential dividend than after the expiration of the said period of five years." Pausing here for a moment, I may remark that the holding of the shares by the executors or administrators of William Wallace after his death is put practically on the same footing whether he dies within the five years' period or beyond it. In the former case, they are forbidden to assign the 100 shares until the five years' period expires, and they receive the preferential dividend. In the latter case, the right of the executors or administrators to receive the preferential dividend is limited only by their [212] ceasing to hold the 100 shares. They are allowed to assign after the five years' period expires; but, if they did so, they were to lose their right to the preferential dividend.

William Wallace died on the 8th January 1888, and consequently after the period of five years limited by the agreement had expired. He left his will, dated the 25th May 1880, unrevoked, and thereby appointed R. Wallace, L. A. Wallace and A. F. Wallace his executors. Of these, R. Wallace predeceased the testator. A. F. Wallace alone proved the will in England. The plaintiff, F. Yorke Smith, as his attorney, has taken out letters of administration to the estate of William Wallace here, with copy of the will annexed.

The testator, William Wallace, by his will, after referring to the conditions under which the 100 shares in the defendants' corporation were held, and to the preferential dividend attaching thereto, directed his executors or administrators to hold the same, and all his interest therein, upon trust, so that the same should be at the absolute disposal of such of his brothers as should survive him. The residue of the testator's property under the terms of the will is given also to the same beneficiaries. Acting under instructions from the plaintiff as representing the estate in India, the defendants' corporation has left the 100 shares upon the register in the name of William Wallace, appending a note thereto, that administration in India to the estate of William Wallace has been granted to the plaintiff as attorney for Mr. A. F. Wallace.

Whether this be the correct mode of keeping the register or not, I think that, for the purposes of this case, it must be deemed that the executor of William Wallace is now the registered holder of the 100 shares. The parties to the agreement contemplate that there could be a holding of shares by an executor. Clause 12 of the agreement as well as clause 13 refers to such a holding, and the agreement recites one of the articles of association of the company which provided that no shareholder should hold more than 25 shares at one time on his own account, nor should any shareholder hold more than that number at any one time in any one representative capacity—a proviso which, however, was not to apply to William Wallace if he became a shareholder. The general estate of William Wallace has all been got in, and is now represented by a sum of money standing to the credit of his executors in England in the books of Wallace Brothers in London as bankers of the executor. There are no assets of William Wallace in India, except the 100 shares in question, with the preferential dividend (if any) payable in respect of them, and as to these shares the plaintiff says that L. A. Wallace and A. F. Wallace are entitled to call upon the administrator of the estate to transfer the same to them. In this sense, he says that the beneficial interest in the 100 shares is vested in them. The estate, therefore, of William Wallace is ready to be handed over to the beneficiaries under his will. This has not been done, because the testator entertained wishes, known to his executor, as to its ultimate disposition, which cannot at present be carried into effect. It is not clear, from the evidence of the executor, Mr. A. F. Wallace, whether those wishes extended to the 100 shares or not. I rather think that Mr. A. F. Wallace intended to draw no distinction between the 100 shares and the rest of the estate.

The estate is all, however, still held by the executor, including the 100 shares. So far as the 100 shares are concerned, the estate has not been got in. If the defendants' corporation refused to deal with the shares according to the wishes of those entitled to them, the attorney for the executor, the administrator in India, would have to sue in respect of them, and conversely, if the defendants' corporation wished to obtain an order from the Court in respect of the shares, they would have to take proceedings against the attorney of the executor. The executor or his attorney is, in fact, still the registered holder of the shares. This is, in my opinion, what is meant by the executor "holding" the shares in clause 13 of the agreement. Holding a share is the equivalent of

being a shareholder, and shareholder throughout the agreement, and the memorandum and articles of association of the company, which must be read with, and in explanation of the agreement, has a fixed and definite meaning, *v.z.*, that of registered holder. For example, clause 4 of the articles of association provides that "every person whose name shall be entered in the [214] register of shareholders as the owner of any share shall as regards the company be deemed to be the owner of such share." Again, clause 7 states: "Every shareholder shall on payment * * * be entitled to a certificate under seal of the company specifying the share or shares held by him and the amount paid up thereon." I, therefore, read clause 13 as if the words "shall be the registered holder or holders of" were substituted for their equivalent "shall hold." The clauses will then read: "In consideration of the transfer by the said William Wallace to the company * * * the said William Wallace, his executors, or administrators shall be entitled so long as he or they shall be the registered holder or holders of the said 100 shares, to an extra or preferential dividend thereon." That appears to me to be the plain grammatical meaning of the sentence, and that is what we must first look to in construing an agreement. In attaching this meaning to the words, there is nothing, I think, repugnant to the rest of the agreement. I have already pointed out that, in the case of the five years' period coming into operation, it is contemplated that the executors shall hold the shares for the portion of that time unexpired at the death of the testator, without reference to the beneficial ownership of the shares.

If I am correct in so reading the clause, the fact that the registered holder of the shares is a trustee for some other person, does not affect the company — *In re Perkins*, 24 Q. B. D., 613. There is no qualification to the words "shall hold the shares" such as "in his or their own right." The question as to the meaning of this qualification which was discussed in *Pulbrook v. Richmond Consolidated Mining Co.* 9 Ch. D., 610, and in *Frambridge v. Smith*, 41 Ch. D., 462, does not, therefore, arise. The absence, however, of words of qualification shows that the intention of the parties to the agreement was to disregard everything but the registered holding.

It is contended by the Advocate General that, under the circumstances which I have detailed, the executor of William Wallace must be taken to have assented to the specific bequest of the 100 shares, and he now holds them, not as executor, but as a [215] trustee for the beneficiaries. That may possibly be so as between the executor and the specific legatees. I express no opinion upon the point. It is not so, I think, as between the executor and the defendants' corporation. The latter have still the right to treat the executor, or the estate he represents, as the holder of the shares. That would be the case if the shares were liable to have calls made upon them — *Keene's Executor's case*, 3 D. M. and G., 273; *Ex parte Bulmer*, 33 L. J. (Ch.), 609; *Ex parte Gouthwaite*, 3 Mac. and G., 187. Here the shares are fully paid up, but the executor is under other obligations to the company, such as those imposed by clauses 4 and 10 of the agreement, see *supra* page 207, note, — theoretical perhaps now, but such as must be taken into account in considering the legal position of the parties. Clause 115 of the articles, see *supra* page 207, note, of the defendants' corporation would seem to indicate that the corporation consider them more than merely theoretical.

The Advocate-General further contends that it is a necessary implication arising from the wording of the agreement, that the preferential dividend was not intended to be perpetual, and, further, that the executor now continuing to hold the shares is a fraud, in its legal sense, upon the agreement. As to the latter point, if the agreement put no limit upon the period for which the executor

should hold the shares after the death of William Wallace, I cannot see that he is not entitled to hold them so long as his beneficiaries and the law allow him to do so. To hold that the executor is bound to cease to hold the shares at any particular time, or at any particular stage of his executorship, would be, in effect, to introduce a new term into the agreement, or to construe it according to its supposed, and not according to its expressed, meaning. As to the preferential dividends not being intended to be perpetual, they are, in terms, limited to the period during which William Wallace, his executors, or his administrators, hold the shares. By appointments perpetually of administrators "*de bonis non*" to the estate of William Wallace, representation to him could be kept up theoretically indefinitely. It is not, I think, necessary in the thirteenth clause of the agreement to construe executors or administrators as [216] including administrators "*de bonis non*." In other clauses it may have to be so construed, but in this clause the expression is used to limit the period of the payment of the preferential dividend; and it seems to me that the expressed intention of the parties to the agreement will be carried out if the words are construed in their strict literal meaning. What, however, I decide is, that the preferential dividend is payable so long as the executor of William Wallace is the registered holder of the 100 shares.

I find on the issues :--

(1) In so far as the defendants' corporation is concerned, that A. F. Wallace now holds the shares as executor of the testator.

(2) In the affirmative, and for the plaintiff.

(3) That the agreement is to be construed as set out in my written judgment.

(4) In the affirmative, and for the plaintiff.

(5) No finding.

Decree for the plaintiff. Declaration in terms of paragraph (a) of the plaint down to the word "aforesaid." Plaintiff to have his costs.

The following was the material portion of the decree :--

This Court doth pass judgment for the plaintiff, and doth declare that clause 13 of the agreement dated the 22nd day of July 1864, hereinbefore mentioned is still in operation, and that the extra or preferential dividend payable on the 100 shares provided for by the said clause 13 is still payable to the plaintiff as administrator of William Wallace as in the plaint mentioned, and this Court doth construe clause 13 of the said agreement in accordance with the written judgment of this Court, copy of the extract from which judgment, so far as it relates to the construction of the said clause, is hereunto annexed and marked A; and on the issue whether the defendants are entitled to raise the questions raised in the following issue, *viz.*, whether Alexander Falconer Wallace now holds the shares referred to, as trustee for the specific legatees, or as executor of the testator, this Court doth record no finding, &c., &c.

[217]. The defendants appealed. In their memorandum of appeal they (*inter alia*) raised the point that the suit was not maintainable.

The plaintiff also filed objections to the decree. He objected, 1st, that it was unnecessary to decide whether an administrator *de bonis non* was or was not included in the words "executors or administrators" in the 13th clause of

The extract referred to comprises from the words "The Advocate General" on page 215 to the end of the judgment.

the agreement; 2nd, that, if it was proper to decide that point, the decision should have been that the said words did include an administrator *de bonis non*.

Inverarity (*Jardine and Anderson* with him) for the Appellants:—This suit is not maintainable. The plaintiff asks merely for a declaration of a right to a dividend which does not at present exist, and which may never exist—Specific Relief Act (I of 1877), sec. 42. The Court is asked to express an opinion as to the construction of the agreement in a hypothetical case, for no dividend has been as yet declared, and the directors have a discretion whether to declare one or not. There is no allegation in the plaint that there are or will be profits. The words in the prayer are "if and when"—*Daniell's Chancery Practice* (6th Ed.), p. 791; *Keran v. Crawford*, 6 Ch. D., at p. 42; *Bright v. Tyndall*, 4 Ch. D., 189; *Strimathoo Moothoo v. Dorasinga Tever*, L. R., 2 Ind. Ap., 169. We may take the point now though it was not taken in the Court below—*Raja Har Narain Singh v. Chaudram Bhagwant*, L. R., 18 Ind. Ap., 55. The Courts are bound to take notice of the provisions of the Act.

Further, the declaration made by the decree is not the one prayed for. The decree assumes there are dividends. The plaint is framed on the assumption that there were none.

As to the construction of clause 13 of the agreement, we say that as soon as it appears that the executor had ceased to hold as executor, and holds it as trustee, he has ceased to "hold" within the meaning of this clause. The executor could not probably be placed in the register as executor—*Buchan's case*, 4 Ap. Ca., 519. The Judge below regards the executor as the registered holder, [218] but he is not. The registered holder is William Wallace. But he is dead, and cannot be the holder—*Bainbridge v. Smith*, 41 Ch. Div., 462. The estate is not the holder, for there is no estate now. It is administered. Wallace's will gives the executors the shares in trust for themselves. As soon as they began to hold "on trust" they ceased to hold as executors. At latest, they do so when all the estate is administered, that is, in this case when all the debts are paid, as there are no legacies. The estate, therefore, should have been transferred to the *cestuis que trustent*. It is possible to cease to be an executor and to hold as trustee—*Lewin on Trusts* (9th Ed.), p. 215; *Phillipo v. Munnings*, 2 My. and Cr., 315; *Dix v. Burford*, 19 Pea., 409, *In re Smith*, 42 Ch. D., 502; *Northey v. Northey*, 2 Atkins, 76.

If, then, as a fact, the executor now holds as a trustee, can he claim to hold as executor within the meaning of clause 13? He claims to be the registered holder. We contend, first, he is not the registered holder, secondly, we say that "holder" in clause 13 does not mean registered holder. In the agreement the word has not the same meaning as it has in the Companies Act.

The construction which the plaintiff seeks to give clause 13 involves this, that, if William Wallace died within five years, his executors could only claim the extra dividend up to the expiration of the five years, but if, on the other hand, William Wallace survived the period of five years and died at a later time, then, although he had received this dividend up to his death (receiving of course the more the longer he lived), yet he was further to be entitled to it in perpetuity. The mere fact of his surviving beyond the period of five years not merely gave to himself during his life a larger consideration for the property which he had transferred, but bound the company to go on paying the consideration for ever to his executors or administrators. It is impossible that the agreement could have intended this.

As to the effect of section 53 of the Indian Companies Act (VI of 1882). Suppose William Wallace had sold the shares in his lifetime on the terms that his name should remain on the register for [219] the benefit of the vendee. If, as

is contended, William Wallace in that case still "held" the shares, the vendee could nevertheless have sued the company, and the company would have to recognize him as *cæstui que trust*—*Binney v. Ince Hall Coal Co.*, 35 L. J. (Ch.), 363, see p. 368. If the vendee ordered the company not to pay William Wallace, it could not do so. Under those circumstances could Wallace be said to be the holder of the shares?

Lang, Acting Advocate-General (*Scott* with him) for the Respondent:—As to this suit not being maintainable because when filed no dividend had been declared, the appellants have no right to take this objection in appeal. If they had taken it below, the plaint could have been amended, as at the time of hearing a dividend had been declared. They cited *Curtis v. Shephard*, 21 Ch. D., 1, and the cases relied on in the Court below.

Sargent, C. J.—This suit arises out of an agreement entered into by the directors of the Burmah Trading Company with Mr. Wallace for the purchase of the timber business which he had been carrying on in Burmah together with the capital, good-will, and assets appertaining to the same. By the 12th clause of that agreement it was agreed that 100 fully paid up shares in the company should be allotted to Mr. Wallace, in consideration of his transfer of the "fixed assets" of the business, and by the 13th article it was further agreed that, in consideration of the transfer of the other assets, "the said W. Wallace, his executors and administrators should be entitled, so long as he or they shall hold one 100 shares, to an extra or preferential dividend equal to one-third of the surplus net profits of the company as may remain in any year after paying a dividend at the rate of 12 per cent. per annum on the paid-up amount of all shares in the company, including the said 100 shares, and after setting apart from time to time out of such surplus profits, as a reserve fund or to the credit of any reserve fund already created, such sum as the directors of the company for the time being should in their discretion think fit, &c."

Mr. Wallace died on the 28th January 1888, having made a will, by which he appointed his three brothers, Messrs. R. Wallace, [220] L. A. Wallace, and A. F. Wallace, his executors, of whom Mr. R. Wallace predeceased the testator, and Mr. A. F. Wallace alone proved the will, which, after referring to the 100 shares and the preferential dividend attaching thereto, directed his executors or administrators to hold the same upon trust so as to be at the absolute disposal of such of his said brothers as should survive him. The plaintiff, as attorney to Mr. A. F. Wallace, has taken out letters of administration to the will in India, and a note that administration has been granted to him has been appended to the register, leaving the 100 shares upon the register still in the name of the testator.

The plaintiff prays "that it may be declared that the said clause 13 is still in operation, and that the extra or preferential dividend payable on the said 100 shares, provided for by clause 13, is still payable and is payable to the plaintiff as such administrator as aforesaid, if and when there shall be sufficient net profits to allow the payment thereof under that clause." The defendants' written statement contends that, "in the events which have happened, A. F. Wallace, as the proving executor of the will of William Wallace, now holds the said shares in the character of a trustee of the same specifically bequeathed by the said will, and not in the character of executor, and that the plaintiff is entitled to the preferential dividends upon the assumption only that the said shares shall, when such dividends may be declared, be held by the executor of the said testator in the capacity of executor, and as an undistributed part of the testator's estate and not otherwise."

A preliminary objection has been taken that the Court will not make a declaratory decree with respect to a right which is future and contingent, as was said to be the case here, there being no fund actually in existence when the suit was brought from which a preferential dividend could be claimed, and no certainty that there ever would be such a fund. It was pointed out that the Court of Chancery in England does not, as a general rule, make a declaration with respect to future or contingent rights. Here, however, the right itself is existent, and although the exercise of it is undoubtedly contingent on there being a balance of profit [221] as contemplated by clause 13 of the agreement, the very nature of the agreement assumes that there may and probably will be such balance, and indeed the past history of the company shows that more than four lakhs have already been applied towards the preferential dividend in question. Further, it is plain that it was intended that the directors should exercise their discretion as to the amount to be carried to the reserve fund, upon which the balance of profit available for the preferential dividend depends, with some regard to the fact that it was agreed to be paid as the consideration for the transfer of the assets other than the "fixed assets." It is, therefore, from the very nature of the case important that the directors should know for certain whether the right to a preferential dividend is still in existence, as contended by the plaintiff, or has come to an end. We think, therefore, that it is clearly a case in which, in the interests of both parties, the Court, in the exercise of a sound discretion, should make a declaration as to the right in question. It is also to be remarked that this objection has been taken for the first time on appeal—a circumstance which by itself is, in our opinion, fatal to it.

The real question between the parties in this case turns upon the meaning to be given to the expression "hold" in the 13th clause of the agreement, which provides for a preferential dividend being paid to Mr. Wallace, his executors and administrators "so long as he or they should hold the 100 shares," which, by the previous clause it had been agreed, should be allotted to him as the consideration for the transfer of the "fixed assets." By holding shares in its ordinary acceptation is meant being a "shareholder," i. e., a person whose name is on the list of shareholders, or at any rate entitled to have his name placed on it, and the language of the latter part of clause 13 shows that Mr. Wallace's holding was regarded as being in that character without any qualification being annexed to it.

As to what is meant by the executors and administrators of Mr. Wallace "holding" the shares, the agreement must be read in connection with the sections of the articles of association of the defendants' company which relate to the transmission of [222] shares. Those sections are sections 29, 30 and 31, and provide that the executors and administrators of a deceased shareholder shall be the only persons that the company can recognize as having a title to the shares, and that they can be registered as shareholders, or elect to have some person to be named by them registered as a transferee of such shares. These articles show that the executors and administrators, although not entered on the register, are the only persons whose title can be recognized by the company. And as long as that is so between themselves and the company, they would be the "holders" of the shares in their representative character, in the sense that no one else could dispose of them, and there is nothing in this agreement to show that the executor and administrator were required to make themselves personally liable by having their own name placed on the register. The shares were fully paid up, and they would remain, in any case, until transferred by the executors and administrators of Mr. Wallace, subject to a lien in respect of all Mr. Wallace's obligations. By "holding," therefore, in

the absence of anything in the agreement to show a contrary intention, must, in our opinion, in the case of the executors and administrators, be understood to be their continuing to be the only persons who could be recognized by the company as having a title to the shares; and the executor Mr. A. F. Wallace is still in that position with respect to the shares.

It is, however, objected by the defendants in their written statement that it never could have been intended that the executors and administrators should continue to be entitled to the preferential dividend after the debts on the estate of Mr. Wallace had been paid, as was admitted to be the case here; and that Mr. A. F. Wallace, the executor, who had taken out probate, would, it was contended, be regarded in a Court of Equity as a trustee for the person entitled to the shares under the will, *viz.*, for himself and his brother, Lewis Wallace. Whether Mr. A. F. Wallace would, under the circumstances disclosed by his deposition, be so regarded by a Court of Equity, is not necessary to determine, as we agree with Mr. Justice FARRAN that there is nothing to be found in the agreement, express or implied, which shows an intention of the parties [223] to the agreement to regard anything but the legal "holding" under the articles of association by Mr. Wallace, his executors and administrators, and that to go beyond that holding would be virtually to add a new term to the agreement. There are no express words qualifying the "holding," and the language throughout the agreement, especially that of the proviso at the close of clause 13, points to Mr. Wallace and his representatives, as the legal holders of the shares, being the only persons in the contemplation of the parties. Lastly, the very form of the consideration provided by clause 13 for the transfer of the other assets, shows that the object the company had in view was to afford an inducement to Mr. Wallace and his executors to continue on the register as the holders of the shares.

These inferences as to the intention of the parties are entitled to special consideration from the circumstance that the agreement is not an artificial document such as is often found in transactions of this nature, but a highly artificial instrument—the work obviously of a skilled draftsman. We are of opinion, therefore, that Mr. A. F. Wallace, by his attorney, the plaintiff, is still holding the shares within the contemplation of clause 13 of the agreement, and the plaintiff is, therefore, entitled to a declaration in the terms of the prayer of his plaint. We do not, however, think it advisable for the Court to express an opinion as to the construction of the expression "executor and administrator," a question which may never arise in the future, and is not raised by the pleadings.

We must, therefore, vary the decree by omitting the part of it which follows after the words "is still payable to the plaintiff as administrator of W. Wallace as in the plaint mentioned," but in other respects the decree is confirmed. Respondents to have their costs of this appeal.

Attorneys for the Appellant:—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the Respondent:—Messrs. *Little, Smith, Frere and Nicholson.*

NOTES.

[On appeal to the Privy Council, this was affirmed. —(1894) 19 Bom. 1]

[224] APPELLATE CIVIL.

The 30th September, 1891.

PRESENT :

SIR CHARLES SARGENT, K.T., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Daji Nilkanth Nagarkar and others.....(Original Plaintiffs) Appellants
versus
 Ganpatrao Nilkanth Nagarkar.....(Original Defendant) Respondent.*

Jurisdiction—Court of Agent for Sirdars in the Deccan—Suit in that Court—*Pensions Act (XXIII of 1871), Sec. 4, applies to such suit—Collector's certificate—Regulation XXIX of 1827, Secs. 4 and 6—Ordinary Rules—Regulation II of 1827.*

A suit brought against a *sirdar* in the Court of the Agent for Sirdars in the Deccan, of the class specified in section 4 of the Pensions Act (XXIII of 1871), requires a Collector's certificate, as provided by section 6 of that Act.

THIS was an appeal from the decision of G. C. Whitworth, Agent for Sirdars in the Deccan at Poona.

Suit for an account and recovery of income.

The plaintiffs alleged that they and the defendant Ganpatrao Nilkanth Nagarkar (deceased pending appeal to the High Court), who was a third class *sirdar*, were co-sharers in certain *jaghir, nam, saranjam* and other properties situate in the Ahmednagar District, that partition had taken place between the co-sharers, and that they had been separately receiving the income of their respective shares; that for the sake of convenience the lands had not been actually partitioned, and that the income thereof had been collected with the assistance of a clerk named Gangadhar Balkrishna Godbole, who was appointed by all the co-sharers, that, latterly, this clerk in collusion with the defendant, who was the senior representative of the family, and under whom the clerk acted, declined to render accounts, &c. The plaintiffs, therefore, brought this suit for an account, &c. They further stated that the defendant being a third class *sirdar* was amenable to the jurisdiction of the Agent for Sirdars in the Deccan, and that they had, therefore, filed the suit against him in the Agent's Court and a separate suit against the clerk, Gangadhar Balkrishna, in the Subordinate Judge's Court.

The defendant, Ganpatrao Nilkanth Nagarkar, contended (*inter alia*) that as some of the property in dispute was service *vatan*, [225] the suit must fail for want of the Collector's sanction under the Pensions Act (XXIII of 1871).

The Agent for Sirdars held that the suit was barred owing to the plaintiffs' failure to produce the Collector's certificate under section 4 of the Pensions Act (XXIII of 1871). On the authority of the case of *Babaji Hari v. Rajaram Ballal*, I L. R., 1 Bom., 75, he dismissed the claim.

The plaintiffs appealed to the High Court.

Ganesh Ramchandra Kirloskar (with *Purushottam Parashuram Khire*) for the Appellants:—The Collector's certificate is not required for a suit in the Agent's Court. It is necessary for a suit filed in an ordinary civil Court; but the Court of the Agent for Sirdars is not such a Court. The appointment of

* Appeal No. 123 of 1889.

the Agent is made under section 3 of Regulation XXIX of 1827, and sections 4 and 6 lay down what suits shall be tried by the Agent and not by civil Courts. Under section 4 of the Pensions Act a civil Court cannot maintain a suit without the Collector's certificate, but the Agent's Court not being a Court contemplated by the Act, a suit filed in his Court cannot fail for want of the certificate, the Agent being invested with a special jurisdiction. The Pensions Act cannot take away a jurisdiction which is specially created under a prior enactment (Regulation XXIX of 1827) for particular purposes. *Khusaldas v. Sakharam Ramchandra*, 12 Bom. H. C. Rep., 212, shows that the Court of the Agent was not considered to be a civil Court under section 284 of the Civil Procedure Code (Act VIII of 1859).

In any case, we contend that the Agent was wrong in dismissing our suit wholly, as our claim includes certain other property to which the Pensions Act is not applicable, and the Agent ought at least to have proceeded to determine the suit with respect to that property.

Mahadeo Chimnaji Apte for the Respondent :—The Pensions Act lays down that no civil Court shall entertain a suit without the Collector's certificate. There is no distinction drawn between the Court of a Subordinate Judge and that of the Agent for [226] Sirdars. The provisions of the Pensions Act apply to all Courts of civil jurisdiction, and what is to be determined is whether a particular Court is a civil Court under Regulation II of 1827; and if so, section 21 of the Regulation and section 4 of the Pensions Act apply to suits brought in such a Court.

The plaintiffs brought the present suit to recover damages. The defendant has died, and the cause of action does not survive against his sons; moreover, owing to the defendant's death, the jurisdiction of the Agent ceases, because, though the defendant was a *sirdar*, his sons are not.

Sargent, G. J. :—Having regard to the general scope and object of Regulation XXIX of 1827, we think that the expression "Ordinary Rules," as used in section 4 of that enactment means the rules for the time being in force determining the jurisdictions of the Judges referred to in that section. We cannot hold that the Agent for Sirdars was intended to exercise jurisdiction only in such cases of a civil nature as the civil Courts were empowered by Regulation II of 1827 to take cognizance of. The object of the Regulation was clearly to invest the Agent with such jurisdiction as would for the time being, but for the enactment of the Regulation, be vested in the civil Courts. If, after the passing of the Act, the jurisdiction of the civil Courts were to become in any way modified, the jurisdiction of the Agent would be similarly modified. Section 4 of Act XXIII of 1871, being now a part of the "Ordinary Rules" determining the jurisdiction of the civil Courts, is applicable, therefore, to the Agent's Court, though that Court is not a civil Court in the ordinary acceptance of the term. As the plaintiff had obtained no certificate from the Collector as regards so much of the claim as is affected by the Act of 1871, the Agent has rightly held that, in respect of such claim, the suit is barred.

The Agent should, however, have dealt with that part of the claim which is not affected by the Act, and he was wrong, we [227] think, in dismissing the whole of the plaintiffs' claim. We must, therefore, reverse his decree and remand the case for a re-hearing. Costs to abide the result.

Section 4 of Regulation XXIX of 1827 is as follows :—

An agent of Government shall be specially appointed for the purpose of receiving, and trying, and deciding all complaints of a civil nature which would under the ordinary rules be cognizable by either of the Judges of Poona and Ahmednagar against any of the persons contemplated in the preceding section.

At the hearing of the appeal it was objected for the respondent that the defendant being now dead, and the suit being one for damages, does not survive against the son. This is a question that must be dealt with by the Court below when the appeal is reheard.

Decree reversed and case remanded.

[17 Bom. 227]

APPELLATE CIVIL.

The 11th February, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Kadappa.....Plaintiff

versus

Martanda.....Defendant.*

Estoppel—Suit on a document executed by defendant in which he was described as a trader —Plea in suit that he was an agriculturist—Dekkhan Agriculturists' Relief Act (XVII of 1879).

The mere fact that the defendant described himself in the instrument, on which the suit was brought, as a trader, would not of itself stop him from pleading at the trial that he was an agriculturist, and entitled to the protection of the Dekkhan Agriculturists' Relief Act (XVII of 1879). There must be evidence to show that by describing himself as a "trader" he represented himself as a trader, and intended that that representation should be acted on by the plaintiff.

THIS was a reference made by Rao Sahib R. D. Nagarkar, Subordinate Judge of Islampur in the Satara District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The circumstances under which the reference was made were as follows :—

The plaintiff, Kadappa, sued to recover possession of a shop and arrears of rent on a rent-note, dated 23rd July 1889, in which the defendant's occupation was mentioned as "trade." In the plaint, also, his occupation was given as "trade." The defendant, Martand, pleaded that he was an agriculturist, and that, therefore, the suit was not maintainable without the Conciliator's certificate under section 47 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). He further stated that he was an agriculturist at the time of the execution of the rent-note sued upon, [223] and had been so ever since, and he claimed the protection of the Act.

The Subordinate Judge, having regard to the description of the defendant in the rent-note and his contention with respect to his status, referred the following question to the High Court:—

"(I) Whether the admission of a non-agriculturist status in the rent-note in question would prevent the defendant from proving the existence of a contrary status on the day of its execution by operating as an estoppel ?

* Civil Reference, No. 23 of 1891.

"(II) Whether, in the absence of an allegation of a change of status, he would be at liberty to prove the existence of the status of an agriculturist after the date of its execution?"

The opinion of the Subordinate Judge on both the points was against the defendant,—that is, on the first in the affirmative and on the second in the negative.

There was no appearance for the parties.*

Sargent, C. J. :—The mere fact that the defendant described himself in the instrument, on which the suit was brought, as a trader, would not of itself estop him from pleading at the trial that he was an agriculturist and entitled to the protection of Act XVII of 1879. There must be evidence to show that by describing himself as a "trader" he represented himself as a trader, and intended that that representation should be acted on by the plaintiff.

Order accordingly.

[17 Bom. 228]
APPELLATE CIVIL.

The 11th February, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Kashinath Trimbak Joshi.... Applicant
versus
Duming Zuran..... Opponent.*

Limitation—Civil Procedure Code (Act XIV of 1882), Sec. 318—Purchaser at Court sale—Certificate of confirmation of sale—Application for possession of purchased property—Date of accrual of right to apply for possession.

The right of a purchaser to apply for possession under section 318 of the Civil Procedure Code (Act XIV of 1882) accrues to him when the certificate "has been [229] granted,"—that is to say, when it has been issued to him, and the period of limitation for such an application is to be computed from that day.

THIS was a reference made by Rao Sahab Ramchandra V. Patki, Second Class Subordinate Judge of Bassein in the Thana District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The applicant, Kashinath Trimbak Joshi, purchased certain immoveable property at a Court sale on the 13th February, 1888, and the sale to him was confirmed on the 18th April 1888. On the 7th October 1890, he applied for a certificate under section 316 of the Civil Procedure Code (Act XIV of 1882), which was granted to him on the 13th February 1891, and was issued to him on the same day. He subsequently presented an application to obtain

* Civil Reference, No. 22 of 1891.

possession of the property under section 318 of the Civil Procedure Code. The Subordinate Judge referred the following question for decision :—

“ Should the period of limitation for the application to recover possession be counted from the day on which the certificate was actually issued to the applicant, or should it be counted from the date on which the sale was confirmed? ”

The opinion of the Subordinate Judge was that the period of limitation should be counted from the date of the confirmation of the sale.

There was no appearance for the parties.

Sargent, C. J. :—The right of a purchaser to apply for possession under section 318 of the Civil Procedure Code accrues to him when the certificate “ has been granted, ”—that is to say, when it has been issued to him. See *Motichand Tarachand v. Naikji bin Gopalji*, P. J., 1886, p. 46.

Order accordingly.

NOTES.

[In the Limitation Act, 1908, Art. 180, was inserted, which makes the date of sale becoming *absolute* (C.P.C., 1908, O. 21, r. 92)—and not the date of issue of sale certificate the starting point for limitation, in suits by a purchaser of immoveable property at a sale in execution of a decree for delivery of possession. It sets at rest the previous conflict of case-law on the subject between (1892) 17 Bom., 223, (1908) 32 Mad., 136; and (1908) 30 All., 390; (1908) 31 All., 82.]

[230] APPELLATE CIVIL.

The 25th February, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Pitambar Mancharam.....(Original Applicant) Appellant

versus

Ishvar Jaduram.....(Original Opponent) Respondent.*

Jurisdiction—Heirship—Application for declaration of heirship—Bombay Regulation VIII of 1827, Sec. 2—Subordinate Judge invested with function of District Court under Act VII of 1889—Jurisdiction of such Judge to hear such application

A Subordinate Judge who (under section 26 of Act VII of 1889) has been invested by Government with the functions of a District Court under Act VII of 1889 has jurisdiction to hear and determine an application made under section 2 of Bombay Regulation VIII of 1827.† THIS was a reference made by G. McCorkell, District Judge of Ahmedabad, under section 617 of the Civil Procedure Code.

The appellant, Pitambar Mancharam, (original applicant), presented a petition under Bombay Regulation VIII of 1827 in the Court of the Subordinate

* Civil Reference, No. 2 of 1892.

† Clause 2 of section 2 of Bombay Regulation VIII of 1827 is as follows :

“ If an heir, executor, or administrator is desirous of having his right formally recognised by the Court for the purpose of tendering it more safe for persons in possession of, or indebted to, the estate to acknowledge and deal with him, the Judge, on application, shall issue a proclamation in the form contained in Appendix A, inviting all persons who dispute the right of the applicant to appear in the Court within one month from the date of the proclamation, and enter their objections, and declaring that, if no sufficient objection is offered, the Judge will proceed to receive proof of the right of the applicant, and if satisfied, grant him a certificate of heirship, executorship, or administratorship.”

Judge of Kaira, praying to be declared the heir of one Motiram Ghelabbhai, deceased. Under section 26 of Act VII of 1889 that Court had been invested by Government with the functions of a District Court under Act VII of 1889.*

[231] The respondent, Ishyar Jaduram, (original opponent), contended (*inter alia*) that the Court of the Subordinate Judge had no jurisdiction to entertain the application under Regulation VIII of 1827, which conferred jurisdiction only upon Zilla Courts.

The Subordinate Judge held that he had no jurisdiction to entertain the application under the regulation, and rejected it.

The applicant appealed to the District Court, and the District Judge, being doubtful, referred the following question for the decision of the High Court:—

"Had the Subordinate Judge authority to hear and determine an application made under section 2 of the Bombay Regulation VIII of 1827?"

There was no appearance for the parties.

Sargent, C. J.:—We think that section 28 of Act VII of 1889† distinctly applies the provisions of section 26 and the other sections set out in section 28 to certificates granted under Regulation VIII of 1827 and applications for such certificates made after the commencement of the Act.

Order accordingly.

NOTES.

[This was followed in (1893) 18 Bom., 748; (1894) 19 Bom., 399.]

* Clauses 1 and 2 of section 26 of Act VII of 1889 are as follows:—

"(1) The local Government may, by notification in the official Gazette, invest any Court inferior in grade to a District Court with the functions of a District Court under this Act, and may cancel or vary any such notification.

"(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Court in the exercise of all the powers conferred by this Act upon the District Court, and the provisions of this Act relating to the District Court shall apply to such an inferior Court as if it were a District Court."

† Section 28.—Notwithstanding anything in the regulation of the Bombay Code No. VIII of 1827, the provision of section 3, section 6, sub-section (1), clause f, and sections 8, 9, 10, 11, 12, 14, 16, 18, 19, 25, 26 and 27 of this Act with respect to certificates under this Act and applications therefor, and of section 98 of the Probate and Administration Act, 1881, with respect to the exhibition of inventories and accounts by executors and administrators, so far as they can be made applicable, apply, respectively, to certificates granted under that regulation, and applications made for certificates thereunder, after the commencement of this Act, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

[232] APPELLATE CIVIL.*The 2nd March, 1892.*

PRESENT :

SIR CHARLES SARGENT, K.T., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Gitabai.....(Original Defendant) Appellant
versus

Balaji Keshav Shastri Nagarkar.....(Original Plaintiff) Respondent.*

*Specific performance—Agreement to sell—Reversionary interest, sale of—Purchase-money less than market value of reversion—Stat. 31 Vic., c. 4—
Inadequate consideration.*

The rule observed in England until the passing of Stat. 31 Vic., c. 4, that specific performance of an agreement to sell a reversionary interest should not be decreed where the purchase-money was less than the market value of the reversion,

Held not to be the rule in India.

THIS was a first appeal from the decision of Khan Bahadur L. G. Fernandez, First Class Subordinate Judge of Poona.

Suit for specific performance of an agreement to sell a house.

The defendant, Gitabai, was the daughter-in-law and heiress of one Nana, deceased. On 18th December 1885, Nana had agreed to sell the house in question to the plaintiff for Rs. 2,000, and then received Rs. 25 earnest-money. At the time of the agreement, Nana was not entitled to the possession of the house. His adoptive mother, Renukabai, was in possession and management, and under the will of her deceased husband she was entitled to it during her lifetime and after her death it was to go to Nana.

On Renukabai's death the plaintiff, in accordance with the agreement, tendered the rest of the purchase-money to Nana, and asked him to execute a conveyance, but he refused. Nana subsequently died, and the plaintiff now sued the defendant, as his representative, to enforce the agreement of sale.

The defendant pleaded that Nana was of weak mind, and had been induced by the plaintiff's misrepresentation to enter into the agreement; that the agreement was, therefore, invalid, and that the suit was time-barred.

The Subordinate Judge found that the claim was not barred by limitation, and allowed it, observing: "The plaintiff has no [233] doubt, secured a good bargain from Nanaji Dinkar without any risk at all to himself * *. I cannot say that he dealt very fairly with Nana, but he is within his legal rights in trying to enforce the agreement, and, as defendant has failed to establish the ground on which the agreement was impeached, the plaintiff is entitled to succeed."

The defendant appealed.

Jarāine (Mahadeo Chimnaji Apte) for Appellant:—Nana had only a reversionary interest in the property. The Court cannot give specific performance of an agreement relating to the sale of such interest. By this agreement Nana sold a house for Rs. 2,000, which, according to the evidence and in the opinion of the lower Court, was worth Rs. 5,000 or Rs. 6,000. The consideration is inadequate. The onus lies on the plaintiff to show it was sufficient: see *White and Tudor's Leading Cases*, Vol. I, p. 685. Moreover, it is shown that Nana

* Appeal, No. 47 of 1890.

was of weak mind, and undue advantage was taken of him. A Court of Equity will not give effect to such an agreement. Under section 28 of the Specific Relief Act (I of 1877) the plaintiff is not entitled to relief, because the consideration for the sale is grossly inadequate.

Branson (D. S. Garud and N. V. Gokhale) for Respondent:—A new case is made here on appeal. The appellant's case in the lower Court was that fraud was practised on Nana, but no fraud was proved. The consideration is not inadequate. Some witnesses, no doubt, say that the house is worth Rs. 6,000 but it is very old, and requires extensive repairs. The plaintiff did not induce Nana to make the agreement of sale. On the contrary, it was he who was anxious to sell. Fraud cannot be presumed, and there is no evidence to prove it. The agreement is, therefore, capable of specific performance (section 22 of Specific Relief Act I of 1877). Nana was not a man of weak intellect. The lower Court has found that he was a man possessed of ordinary capacity. He himself could not have resisted a decree for specific performance, and if so, his heirs cannot.

Sargent, C. J. :—The case was tried below on the statements contained in the written statement that the plaintiff had practised [234] fraud on Nana by representing that Nana's mother had given the house away from Nana to her mother. It was also stated that Nana was a simpleton. Those defences were held by the lower Court not to be supported by the evidence. And no attempt has been made before us to impeach that finding.

Here, however, it has been sought to impeach the sale on the ground that, being a sale of a reversionary interest, the Court would not decree specific performance, as the purchase-money was less than the market value of the reversion. Such, no doubt, was the practice in England until the passing of 31 Vic., c. 4, but it cannot, we think, be held to be the rule in India. Mention of it is to be found in the Specific Relief Act, and, if it had been intended to give effect to it, we should have expected to find it in section 28 of the Act. It is further to be remembered that the Specific Relief Act I of 1877, which was passed after the English Act had been passed, abolishing the rule, was drawn by a jurist who had had long experience of the practice of the Court of Chancery.

The only other question which can be raised on the evidence is, whether the price for which the property was sold was so grossly inadequate as to be evidence of fraud practised on the vendor. We do not think that was the case. The property would not probably have been let for more than Rs. 250 per annum. That rental capitalized at 16 per cent. subject to a deduction of 10 per cent. for repairs would give Rs. 3,100 as the value of the property, and it was sold for Rs. 2,000. The defendant having failed to establish the defence

¶ Sec. 22 :—The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

Discretion as to decreeing specific performance.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.]

actually set up, and the only grounds on which the case has been argued before us having also failed, we confirm the decree of the Court below with costs.

Decree confirmed.

NOTES.

[It is pointed out in Shephard and Brown's Transfer of Property Act, 1882 (7th Edn. 1910) p. 40, that cases like this cannot be good law in view of decisions, like 31 Bom., 165; 30 Bom., 304, declaring instruments dealing with *spes successionis* as inconsistent with the provisions of sec. 6 thereof.]

[235] APPELLATE CIVIL.

The 7th March, 1892.

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Joharmal.....(Original Plaintiff) Appellant
versus

Tajram Jagrup.....(Original Defendant) Respondent.*

*Registration—Partnership—Mortgage of land to a firm—Dissolution of firm—
Division of assets among partners—Letters of one partner to another
transferring to the latter the share of the former in the assets of the
firm, including the mortgages, but not mentioning them—
Necessity of registering such letters—Evidence—Regis-
tration Act III of 1877, Secs. 7 and 49—The
words "document" and "instrument" in
the Registration Act.*

By two mortgage-bonds, dated, respectively, 25th July 1866, and 19th September 1870, certain lands were mortgaged to a firm of money-lenders at Khadkala, carrying on business under the style of Gangaram and Mayaram. There were four partners in the firm, viz., Gangaram, Mayaram, Panji and Sadaram. In 1874 Gangaram retired from the firm, and wrote three letters, the effect of which was to transfer his share in the partnership to Panji and Sadaram. In 1878 the shop was closed, and the partners divided the assets of the firm. The two mortgages fell to the share of Sadaram. Subsequently Sadaram died, and the plaintiff, his son, inherited his property and took possession of the mortgaged lands. These lands were afterwards attached in execution of a money decree against one of the mortgagors (defendant No. 1). The plaintiff objected to the attachment, but his objection was disallowed, and the property was sold in execution and purchased by defendants Nos. 2 and 3. The plaintiff then filed this suit to establish his rights under the two mortgage-bonds. The defendants contended that the plaintiff had no interest in the mortgages, and was not entitled to sue. The plaintiff relied (*inter alia*) in support of his title upon the letters (A, B and C), whereby Gangaram had transferred his share in the assets of the firm to his (the plaintiff's) father Sadaram. These letters were objected to as inadmissible in evidence, not having been registered.

Held, that, independently of the letters, there was evidence to show that the plaintiff's father Sadaram was a partner in the firm, and that as such partner the mortgages in question fell to his share at the final division of assets. The position of Sadaram as a partner, being once established, his right to the property followed by operation of law, and no other proof of title was required.

* Second Appeal, No. 138 of 1891.

Per JARDINE, J. :—"To lay down that the three letters in question, which deal generally with the assets moveable and immovable, without specifying any particular mortgage or other interest in real property, require registration, would, I incline to think, in the present state of the authorities, go too far. It may be argued that such letters are not 'instruments of gift of immovable property,' but rather disposals of a share in a partnership of which the business is money-lending, and the mortgage securities merely incidental thereto."

[236] *Per TELANG, J.* :—"Although a partner's share does not include any specific part of any specific item of the partnership property, still where the partnership is entitled to immovable property such share does include an interest in immovable property, and, therefore, every instrument operating to create or transfer a right to such share requires to be registered under our Registration Act (III of 1877). It is true that the authorities referred to apply, in terms, only to immovable property owned by a partnership. But I am, on the whole, disposed to hold that the principle of those authorities applies to cases where immovable property is held by a firm not in full proprietorship, but only by right of mortgage. . . Upon the whole I should, if necessary, have been disposed to hold that the letters in question not being registered were rightly treated by the Court below as being inadmissible in evidence to prove directly a transfer of the share of Gangaram in the partnership to Sadaram."

Per TELANG, J. :—"A perusal of various sections of the Registration Act seems to show that the Legislature has used the words 'document' and 'instrument' interchangeably."

SECOND APPEAL from the decision of W. H. Crowe, District Judge of Poona, in Appeal No. 207 of 1889.

A firm of money-lenders carried on business at Khadkala under the style of Gangaram and Mayaram. The partners in the firm were Gangaram, Mayaram Panji and Sadaram (plaintiff's father).

On the 25th July 1866, certain land (Survey Nos. 39, 41 and 68) was mortgaged to this firm by Lakshman and Ramji bin Lakshman, and on the 19th September 1870, certain other land (Survey Nos. 34, 37 and 110) was mortgaged to this firm by Ramji bin Lakshman. The mortgages mentioned in the deed were the two partners, Gangaram and Mayaram, but they took the mortgages on behalf of the firm.

In 1874 Gangaram retired from the partnership, and went to his native place in Marwar. From there he sent three letters (Exhibits A, B and C) by post to Sadaram, his former partner and the father of the plaintiff.

These letters were to the following effect :—

"I intend to become a *sanyasi*. I have a shop at Khadkala. My share therein is worth Rs. 6,500. You should make a settlement of my debts by paying off my creditors. Remission to the extent of Rs. 3,000 should be given to my debtors. You should get the lands and houses transferred to your name. The property should be divided between you and Panji."

[237] Mayaram subsequently retired also from the firm, and Sadaram and Panji remained the sole surviving partners.

In 1878 the shop was closed. A division was made of the partnership property, and the two mortgages of 1866 and 1870 fell to the share of Sadaram, the plaintiff's father.

On Sadaram's death his son, the plaintiff, inherited his property, and took possession of the mortgaged lands.

Subsequently these lands were attached in execution of a money decree against the mortgagor, Ramji bin Lakshman; (defendant No. 1). The plaintiff objected to the attachment, but his objection was disallowed, and the lands were purchased at the Court-sale by defendants Nos. 2 and 3.

The plaintiff then filed this suit for a declaration that the lands were not liable to attachment and sale in execution of the money decree, or that, if they

were so liable, the defendants Nos. 2 and 3 (the auction-purchasers), were not entitled to possession without satisfying the plaintiff's mortgage lien under the two mortgage bonds of 1866 and 1870, respectively.

The defendants pleaded (*inter alia*) that the plaintiff had no interest in the mortgages in question, and could not, therefore, sue.

The plaintiff relied on the above-mentioned letters, (Exhibits A, B and C.) in support of his title.

The defendants objected to the admissibility of the letters, on the ground that they were neither stamped nor registered.

The Subordinate Judge overruled this objection, admitted the letters in evidence, and passed a decree in plaintiff's favour.

On appeal the District Judge was of opinion that the letters in question were inadmissible for want of stamp and registration, and as they were the only proof of plaintiff's title, he held that the suit must fail. He, therefore, reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim.

Against this decision the plaintiff appealed to the High Court.

M. B. Chaubal for Appellant:—The letters are admissible in evidence. They are not instruments creating any right, or in-[238]terest in immoveable property within the meaning of the Registration Act (III of 1877). They do not come within the definition of instrument: see Wharton's Law Lexicon. Such informal documents do not need registration. There is no provision in the Act making registration of such letters compulsory. Refers to *Waman Ramchandra v. Dhondiba*, I. L. R., 4 Bom., 126; *Oo Noun; v. Moung Htoon Oo*, I. L. R., 13 Cal., 322; *Kedar Nath Dutt v. Sham Lall Khetry*, 11 B. L. R., 405. Even if they required registration to prove the transfer of one partner's share to another, they would be still admissible to show that the plaintiff's father was a partner in this firm. It is found by both the Courts below that the two mortgage bonds under which we held the property in dispute, were passed to the firm, and were treated as part of the firm's assets, and that they eventually fell to the share of our father. Upon these facts we are entitled to a decree.

R. N. Bhajekar for Respondent:—The letters are inadmissible for want of registration and stamp. The words "I have given the ownership to you" show that the whole interest of one partner in the partnership property was transferred to another partner. And as part of the partnership property admittedly consisted of these lands mortgaged to the firm, these letters must be held to convey or transfer an interest in immoveable property. They, therefore, require registration. We do not admit that the mortgage-bonds were passed to the firm. They are passed to the individuals Gangaram and Mayaram personally and not on behalf of the firm.

Jardine, J.:—Mr. Chaubal argued several points on behalf of the appellant-plaintiff. But as no issues were raised below about estoppel and adverse possession, and as the claim was not based on adverse possession, we refrain from dealing with these matters in second appeal.

The plaintiff claims the lands in suit under two mortgage-deeds executed by the owners in 1866 and 1870 respectively. His case was that these mortgages were in favour of a money-lending firm: that several changes of partners occurred, on which occasions these mortgages were treated as partnership property: that [239] the plaintiff's father, Sadaram, was admitted as a partner as evidenced by three letters dated 1874, A, B and C: that some time after this, Panji and Sadaram remained the only partners, and that, on a division between them, these two mortgages were assigned to the share of Sadaram, and that by means of partitions after Sadaram's death they became the sole property of the plaintiff, who claims as mortgagee in possession.

The lands were attached by the first defendant in execution of decrees against one of the mortgagors, and the plaintiff did not succeed in raising the attachment.

Among other pleas the defendants in both Courts below averred that the mortgages were not genuine, and were not passed for consideration: but these questions were decided against them at the trial and have not been raised here.

The Subordinate Judge was evidently of opinion, as shown by his recital of the evidence of fact, that the rights over the property acquired by the mortgagees were for the purpose of the partnership business. It would appear that upon this part of the judgment an issue was raised in the District Court, whether the plaintiff was entitled to sue alone. The District Judge found this issue in the affirmative. It has been faintly argued in the present appeal that the facts do not show that the mortgages were partnership property. It may be that, if we were at liberty to go into all the facts, the point would require consideration (see Lindley on Partnership, Book III, Chap. 4, section 2, and Cunningham and Shepherd's Indian Contract Act under section 253), but we do not think this arises in second appeal. It must also be taken as a fact found below that the plaintiff is the only remaining partner.

With reference to the question whether the letters transferring the property required registration, I may here state my opinion that the mortgage transactions about the immoveable property in suit were ancillary to the trade of money-lending—*Steward v. Blakeway*, L. R., 4, Ch. 603. The Subordinate Judge held that the letters A, B and C were admissible in evidence, but the District Judge has [240] held them inadmissible under the Registration Law, Act VIII of 1871, section 17. Act XVIII of 1869, Schedule 1, article 13, he also observes, required that they should be stamped. But under section 34 of the present Stamp Law, Act I of 1879, this omission to stamp is immaterial, the documents having been admitted in evidence by the Subordinate Judge—*Gurpadapa v. Naro*, I. L. R., 13 Bom., 493; *Punchanund Dass Chowdhry v. Taramoni Chowdhraim*, I. L. R., 12 Cal., 64; *Ramasami v. Ramasami*, *ibid.*, 5 Mad., 220.

We have next to consider whether the documents are such as required registration under section 17 of Act VIII of 1871. It is contended for the respondents that these documents constitute an instrument of gift of immoveable property, as was evidently held by the District Judge. The appellant's pleader refers us to the doubts expressed by WESTROPP, C. J., in delivering the judgment of the Full Bench in *Waman v. Dhondiba*, I. L. R., 4 Bom., at p. 159, as to the extent of the meaning of the word *instruments* in the section we have to construe. This point had been argued, and the definition of instrument in Wharton's Law Lexicon as a "formal legal writing" quoted; and the judgment notices that no provision appears to have been made for registering a contract lying in letters, similar to the provisions in the Stamp Acts with reference to an agreement lying in letters or those in the Registry Acts of Parliament where the conveyance or security is contained in more writings than one. I concur with my brother Telang, however, in distinguishing the present case on the ground that the letters A, B and C are rather repetitions of each other than a series in which each is required to help the others in order to spell out the disposition which the retiring

[Art. 13.—

Description of Instruments.	Proper Stamp-duty.
Assignment of any interest secured by a bond or mortgage deed	The stamp-duty with which a Bond for such amount is chargeable (No. 5).
(a) When the amount of such interest does not exceed Rs. 3000	Sixteen rupees.
(b) In any other case.	

partner meant to make of his immoveable property, being assets, of the firm. *Oo Nong v. Moungh Htoon Oo*, I. L. R., 13 Cal., 222, which follows *Kedar Nath Dutt v. Shahn Lall Khettry*, 11 Beng. L. R., 405, was also cited to us. It was contended for the appellant that the three letters were admissible at any rate to show how the mortgagee's rights being partnership property, came to the appellant's share. I will consider this point later.

[241] The cases cited to us on the question of registration, and mentioned above, do not help much on the construction of section 17 of the Act: and I have not found any reported Indian case in point. *The Menglas Tea Estate case*, I. L. R., 12 Cal., 383, where the question was whether the document was a transfer of a lease or a conveyance of a share of a partnership, is really an interpretation of articles 21 and 60 of the Stamp Act I of 1879, and leaves unnoticed the equitable doctrine discussed in the English cases to which in these judgments we refer, although not one of them has been cited in the arguments. The doctrine is stated in Lindley on Partnership, (5th Ed.,) p. 343, in the following terms:—"From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties." At page 347 the learned author states: "It follows, however, from this doctrine, that probate duty and legacy duty are payable in respect of the share of a deceased partner in partnership real estate: and a partner's share in such estate is clearly within the Charitable Uses Act—9 Geo. II, c. 36."

As to the application of the doctrine to cases on the statutes relating to Probate and Legacy Duties this statement is supported by *Attorney-General v. Brunning*, 8 H. L. Cases, 243; *Forbes v. Steven*, L. R., 10 Eq., 178; *Attorney-General v. Hubbuck*, 10 Q. B. D., 488 and in Appeal 13 *ibid.*, 275. Thus the share in partnership is made liable for probate duty, following the rule laid down in *Darby v. Darby*, 3 Drow., 495, that "if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty and effects a conversion out and out," or, as remarked by BOWEN, [242] L. J., in *Attorney-General v. Hubbuck*, 13 Q. B. D., at p. 289, this doctrine of conversion necessarily affects partnerships: partnership property is that which is held by the partners for the purpose of the partnership, of carrying on the adventure of the partnership; and must be treated in the end as subject to a trust for sale, and, therefore, it is personal property.

There is another class of cases interpreting the Statute of Mortmain, 9 Geo. II, c. 36. In *Myers v. Perigall*, 2 D. M. and G., 599, share in a joint-stock bank, the assets of which comprised land and mortgages, were held not to be within the Statute: and Lord ST. LEONARDS proposed the following test, which, it is submitted in *Clerke and Humphry's Sales of Land*, p. 12, seems to be equally applicable to the Statute of Frauds:—"The true way to test it would be to assume that there is real estate of the company vested in the proper persons under the provisions of the partnership deed. Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes? They would have no right to step upon the land: their whole interest in the property of the company is with reference to the shares bought, which represent their proportions of the profits." He goes on to say: "In short, a member has no higher interest in the real estate of the company than that of an ordinary partner seeking his share of the profits out of whatever

property those profits might be found to have resulted." This case is followed in *Entwistle v. Davis*, L.R., 4 Eq., 272, where Sir W. PAGE-WOOD, V. C., held that shares in land companies were not an interest in land within the Statute, 9 Geo. II, c. 36. The Vice-Chancellor said: "Since the decision in *Myers v. Perigall*, the test is not whether the holders of the shares can in some sense be said to be interested in land, but whether the share is such a share as, under any ordinary state of circumstances, can result to him in the shape of land. In other words, is the right of a shareholder merely a right to call for his share of the profits, and not for a specific part of the land itself?" In *Attree v. Howe*, 3 Ch. D., 337, HALL, V. C., held the debenture stock of a railway company to be within the Statute; but this decision was reversed on appeal, where in [243] the judgment JAMES, L. J., states the policy of the Act and uses the following language as to the decision:—"It has been held that a share or interest in a trading partnership or business, incorporated or unincorporated, is not within the prohibition, although it may have, as indeed almost every business has, some interest in land with which or on which it is carried on, or although it may have among its assets any amount." But then in the year 1880, in *Ashworth v. Munn*, 15 Ch. D., 368, the same learned Judge qualifies this language as too general; and the latter case interprets *Myers v. Perigall* so as to restrict its effect to shares in companies, corporate or unincorporated, which companies have a perpetual or continuing existence, notwithstanding the changes in the persons who constitute the partnership, and which shares can be realized not only by winding up the whole concern, but by selling them in the market. Ordinary partnerships are thus excepted from the rule about charitable gifts laid down in *Myers v. Perigall*. In *Ashworth v. Munn*, the Lords Justices followed the decision of Lord Chancellor CAIRNS in *Brook v. Badley*, L. R., 3 Ch., 672, a case of 1868, where it was held that a legacy payable out of personalty and of the proceeds of the sale of real estate is an interest in land within the Statute of Mortmain, and cannot, whilst it remains unpaid, be bequeathed by the legatee for charitable purposes. Lord CAIRNS said: "The case, as I have described it, seems to me to be exactly within the 3rd section of the Mortmain Act (9 Geo. II, c. 36) which enacts that all gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever of any lands, tenements or other hereditaments, or of any estate or interest therein, to any charitable use shall be void." I pause here to notice the different language of the clause of the Registration Act we have to interpret—"Instruments of gifts of immoveable property," which are among the documents "required by section 17 to be registered," and which section 48 makes inadmissible "as evidence of any transaction affecting such property," "unless it has been registered in accordance with the provisions of this Act" (VIII of 1871). In *Ashworth v. Munn*, a testator, who was a partner in a mercantile firm, gave the proceeds of the sale of his share of certain real estate which was [244] held as partnership property to charitable uses. Vice-chancellor MALINS held that, although the real estate must as between the real and personal representatives be treated as personal property, yet it was quite a different question whether the proceeds could be applied to charitable purposes, and he decided "that any property derived from the sale of free-hold estate is within the Statute of Mortmain, and cannot be applied for the benefit of the charities mentioned in the will." The Lord Justices in appeal affirmed the decision. The reasons given require close attention. Lord Justice JAMES says at p. 367 of the Report: "With some fluctuation of opinion during the time of the argument, it appears to me at last that we must arrive at the conclusion that the case is hit by the words of the Statute commonly called the Statute of Mortmain." Then after discussing *Myers v. Perigall* he lays stress

on the words "any charge or incumbrance." "Those very words are in the Statute and were put in for the purpose of preventing possible evasions, some instances of which I attempted to give in the judgment in *Attree v. Howe*." Then he supposes a case where the partner has a right in property which "in one sense is pure personalty, because it is personalty as between the real and personal estate, still it is exactly that which comes within the very words of the Statute." Lord Justice BRETT could not but marvel at the great length to which the construction of this Mortmain Act has been carried. "It seems to me," he says, "to have been carried much further than the reason of its enactment suggested or authorized; but the construction has been carried to this great length by authorities which are binding upon us and which we have no right to dispute." He felt bound to follow *Brook v. Badley*. He held that the exceptional cases on corporations did not apply, and ended as follows on the case before him:—"It comes within the proposition laid down by the cases, that where it may be necessary to deal with the land in order to effectuate the devise in favour of the charity, the gift is void. Therefore, it seems to me that the case of an ordinary partnership is not within the exceptional rules, but within the original rules, and, therefore, this decision is correct." The judgment of Lord Justice COTTON seems to be founded on considerations closer to those which arise on the words we are to [245] interpret. The question, he says, is not what the charity can take under this will, but what was the interest of the testator in the property which he attempted to devise to the charity. What the Act points at is the devise of land—that is, it prevents testators giving by their wills that which in them is land, or an interest in land, and what we have to consider really is, whether or no the interest of the testator was land or "any estate or interest in land, or any charge or incumbrance thereof." Then the Lord Justice dealing with the matter first without reference to any of the cases on the point considers whether there was or was not an interest or charge on land. "If a charge, then it was an interest." At p. 374, continuing the argument, he says: "At all events it is the right of the surviving partner, if he desires it, to say there shall be a sale, and, therefore, I say that the testator could not get his interest in this partnership or in this land, except either by special arrangement or by sale. Then when there was a sale, he would have a right to the proceeds of the sale of the land, and to have that paid to him, and until there was a sale he would have a claim against the land; and as against also the other assets of the partnership, whether you call it lien or charge, or anything else, to secure to him what was ultimately coming to him. It is, in my opinion, independently of any decision, an interest in land, and we cannot but say that a gift of his interest in the partnership property, being land, is a gift of an interest in land within the 3rd section of the Statute of Mortmain." Then he relies on *Brook v. Badley* as authority applicable to partnership property as well as to other property.

It appears to me that the decisions on the Statute of Mortmain proceed generally on the words of the Statute and on the mischief at which it strikes: and as the Statute being held to be remedial is liberally and beneficially interpreted so as to suppress the mischief and advance the remedy—*Jeffries v. Alexander*, 8 H. L. C., at pp. 628, 646, 656,—we must be cautious in using these decisions as guides to the construction of a Registration Act which is to be more strictly construed.

There is another class of decisions which are usually cited in dealing with Probate Duty and Mortmain cases, I mean those [246] about equitable freeholds qualifying for the electoral franchise. I pass over *Baxter v. Brown*, 7 M. and G.,

198, which is discussed in *Watson v. Spratley*, 10 Exch., 222, (a case on the Statute of Frauds) and referred to in *Watson v. Black*, L. R., 16 Q. B. D., 278, as a case that has been sometimes doubted and sometimes distinguished. *Watson v. Black* follows *Bennett v. Blain*, 15 C. B. (N S.), 518 : s c. 33 L. J. (C.P.), 63, which dealt with shares in a corporation. In *Watson v. Black* the associated, but in no way incorporated, partners had vested the freeholds in their trustees free from any equitable interest in the individual members in the land itself, and these partners had an interest in the profits only. It was, therefore, held by COLERIDGE, C.J., and GROVE and CAVE, JJ., that they had no equitable interest in the freeholds. In the case before us, there is no such vesting, and perhaps *Watson v. Black* may be used as tending to show that the letters purported to convey an interest in immoveable property.

I have found no case in point decided on the English or Irish Registry Acts : and will now turn to those which interpret the Statute of Frauds, which, as its author Lord NOTTINGHAM remarks in *Ash v. Abdy*, 3 Swan., 664, restrains the common law and ought, therefore, itself to be restrained by exposition. The words in section 4 are "any contract or sale of lands, tenements or hereditaments or any interest in or concerning them." *Watson v. Spratley*, 10 Exch., 222, is authority that shares in a mine worked on the cost book principle do not constitute an interest in land within the section, in the absence of evidence that the shareholders take a direct interest in the freehold. The partnership was treated as similar to an incorporated Joint Stock Company. [See Sudden on Vendors and Purchasers (14th Ed.), 127, commenting on *Boyce v. Greene*, Batty's Irish R., 608.] In *Gray v. Smith*, L. R., 43 Ch. D., 208, the partnership assets included leaseholds. KEKEWICH, J., held that the agreement for the dissolution of the partnership came within section 4, on the ground that the party sought to be charged must part with and assign to others an interest in land. He thus distinguished the agreement in question from an agreement to form a partnership which may be by parol—*Forster v. Hale*, 3 Ves., 696 ; 5 Ves., 308 ; *Dale v. Hamilton*, 5 Hare., 369,—even when the partnership was to deal with land. The Lords Justices upheld the decision. Lord Justice COTTON notes that there was no argument on the point whether the agreement was within section 4, and says : "As at present advised, I agree with Mr. Justice KEKEWICH that the agreement is within the 4th section, so that a memorandum in writing is necessary." No reasons for their opinion are given by the Lords Justices.

It may be that the tendency of decisions in England is to bring partnership agreements conveying interests in land among other assets within section 4 of the Statute of Frauds, as has been done under the Statute of Mortmain. But the authorities do not appear to me sufficiently numerous and clear to make it easy to apply them to the Registration Act of India (III of 1877). The case of *Forster v. Hale*, 3 Ves., 696 ; 5 Ves., 308, decided by Lord Chancellor ROSSLYN has not been overruled. There one of four partners in a bank took with three strangers a lease of a colliery as tenants-in-common. The Lord Chancellor said, p. 309 : "The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership." This was in answer to the objection that a signed writing was required by the Statute of Frauds. Vice-Chancellor WIGRAM in *Dale v. Hamilton* carried the doctrine farther, as pointed out in

Lindley on Partnership and in Story on Contracts, (5th Ed.), section 83, Note, going according to Sir N. LINDLEY a long way towards repealing the Statute of Frauds.

In determining whether transfers of shares of partnerships, which hold, among other assets, interest in immoveable property, require registration, a Court must be influenced by the policy of [248] the Act as gathered from its language and provisions and those of the earlier legislation. But on this part of the subject there has been no argument, the provision in section 17, which excepts shares of Joint Stock Companies from clauses 2 and 3, not having even been noticed. To lay down that the three letters in question, which deal generally with the assets, moveable and immoveable, without specifying any particular mortgage or other interest in real property, require registration, would, I incline to think, in the present state of the authorities, go too far. I am apprehensive of the inconvenience which such a decision would cause to traders, especially to the money-lenders, who all over the country form firms and advance money on land. It may be argued, as in *The Menglas Tea Estate case*, that things ought to be called by their right names; and that such letters are not "instruments of gift of immoveable property, but rather disposals of a share in a partnership of which the business is money-lending and the mortgage securities merely incidental thereto.

For another reason based, however, on somewhat the same consideration I am of opinion that we should reverse the District Judge's decree. I agree with my learned brother, whose judgment I have had the advantage of perusing, that the plaintiff was entitled to give parol evidence that the two mortgages in question were the property of the partnership, and that he is now the sole remaining partner—*Forster v. Hale*. We may further find that the plaintiff has proved these facts.

I concur as to the nature of the relief to be decreed, by giving the plaintiff a declaration. We must now reverse the decrees of the lower Courts and pass a new decree. The respondents to pay the plaintiff's costs of the suit and both appeals.

Telang, J. :—The first question argued on this appeal was, whether the exhibits marked A, B and C are or are not admissible in evidence, they not having been registered. The decision of that question raises several subordinate questions. The documents referred to are, in form, letters, as stated by the District Judge, addressed to Sadaram, the father of the plaintiff, by one Gangaram *alias* Godidas, who was one of the original mortgagees in the mortgage-deed under which the plaintiff claims. For the appel-[249]lant, the plaintiff, it was argued, that the mortgages were made to the firms of which Gangaram was a member, while the vakil for the respondents has contended that the mortgages must be taken to have been made, not to any firm, but to the individuals Gangaram and Mayaram and Panji named in the mortgage-deeds. Looking, however, at the fact that the mortgages are described in those deeds respectively as "Gangaram and Mayaram, a firm of Khadkala," and as "Gangaram and Panji, a firm of Khadkala," that the full names of Gangaram and Mayaram and Panji are not given in those deeds, and that Gangaram and Mayaram and Gangaram and Panji are found to have been actually the names of the respective firms, it would be difficult to hold that the construction contended for on the part of the respondents is correct. That construction, evidently, was not the one adopted by the Subordinate Judge; and there is nothing in the judgment of the District Judge to show that he dissented on this point from the Subordinate Judge's opinion, but rather the contrary. Further, we may the more readily adopt the appellant's argument about the firms being

the benedictories under the mortgages, as they were so treated by the mortgagees themselves in their subsequent transactions *inter se*, about the factum of which no dispute whatever has been raised on behalf of the respondents, and by which, as pointed out by the Subordinate Judge, the mortgage, after having been included in the successive divisions among the partners, came ultimately to the share of the father of the present plaintiff. In dealing therefore, with the point of the admissibility of the documents referred to, it must be assumed that the mortgages in question were made to the partnership and formed a part of the assets of the partnership.

Now there can be no doubt that the partnership by virtue of the mortgages owned a certain interest in immovable property. *Sing v Parker*, 9 Beav. 450, and *Gopal Narayan v Trimbak Sadashiv*, 1 L. R. 1 Bom. 267. And the question is, whether the share of Gungram is one of the members of that partnership, must also be deemed to include an interest in immovable property, or whether the letters do, in fact, deal with such an interest. He the same property [250] included in that share or not. Upon the latter point there is not apparently much room for doubt. For although the letters are, as might be expected, written altogether in artificial language the references made in them to the immovable property amount to no more than a direction about its transfer from the name of the writer to the names of plaintiff's father and Panji. The words, at all events do not themselves create an interest in immovable property. Nor is it apparently the intention of the letters to create any such interest—except in so far as it results from the transfer of the share in the partnership which doubtless is the principal matter dealt with in the letters. Although there are certain rather obscurely worded sentences in them, their effect taken altogether I find to be this, that Gungram transferred his share in the partnership, subject to certain directions given to Sadaram and Panji, and in order to carry out the transfer fully so that his name might no longer be used in any way in any of the transactions of the firm he directed that all the property including immovables standing in his name should, by the aid of the power of attorney already executed by him, be transferred into the name of Sadaram.

The question, therefore, is nextly raised in this case—whether a share in a partnership, which possesses a mortgage of immovable property among its assets includes an interest in immovable property within the meaning of the Registration Acts. The question does not appear to have been decided in any of the Indian Courts. The case of *O. Nung v Moung Htoon* O. L. R., 13 Cal. 322, which was the only authority cited to us in the arguments on this part of the case, related to a letter evidencing an equitable mortgage, and was decided on the authority of the familiar case of *Kedar Nath Dutt v Sham Lal Khetry*, 11 B. L. R. 405 before Sir R. COUCH. That case however has no application on the present point. The case of *In re The Konkoli Tea Co.* L. R., 13 Cal. 42 was apparently a case of joint owners, not partners, and there all the owners jointly conveyed the immovable property in question. The point there also was thus very different from the one we have here to deal with. The [251] earlier case of *The Menglas Tea Estate*, 1 L. R. 12 Cal. 343 is also not in point. That, like the case of the *Kondoli Tea Co.*, arose on the Stamp Act, and the only question there was whether the document of conveyance was a transfer of certain leases only, or whether it was a transfer of the whole of one partner's share in the partnership to which the leases belonged. The cases thus being inapplicable we must deal with the question on general principles as one of first impression.

Now, it is doubtless thoroughly well established that, in the language of Lord Justice LINDLEY, "what is meant by the share of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and all the debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives or to a legatee of his share; which under the old law was considered as *bona notabilia*; which on his bankruptcy passes to his trustee; and which the Sheriff can dispose of under a *fi fa.* issued at the suit of a separate creditor, Lindley on Partnership, (5th Ed.), p. 339." And in *Forbes v. Steven*, L. R., 10 Eq., 178, Sir W. JAMES, then Vice-Chancellor, said: "It has long been the settled law of this Court, that real estate bought or acquired by a partnership for partnership purposes (in the absence of some controlling agreement or direction to the contrary) is, as between the partners and as between the real and personal representatives of a partner deceased, personal property, and devolves and is distributable and applicable as personal estate and as legal assets." And the learned Judge then went on to refer to *Darby v. Darby*, 3 Drew., 495, and *Myers v. Perigall*, 2 D. M. and G., 599, as illustrating the doctrine so stated by him.

At first sight, this doctrine seems to lead logically to the conclusion, that a document effecting the transfer of a partner's share, which is thus a mere transfer of personalty, cannot be compulsorily registrable under the provisions of our Registration Act. It seems to me, however, that such a conclusion would not be quite correct. In the first place, Sir W. JAMES only speaks of the equitable conversion "*as between the partners and as between [252] the real and personal representatives of the partner deceased*;" and LINDLEY, L. J., in another passage of his work (page 347) says that the doctrine "merely amounts to this, that on the death of a partner, his share in the partnership property is to be treated as money not as land." This obviously would not affect matters either during the lifetime of a partner—LINDLEY, L. J., says in so many words that it has no practical operation till his death, page 348,—or as against parties strangers to the partnership, *e. g.*, the firm's debtors. Further, a mortgage debt also, in the view of English Courts of Equity, has long been treated as part of the mortgagee's personal estate. And those Courts have uniformly held from early times that "in all mortgages the money must go to the executor or administrator and not to the heir of the mortgagee." This rule has been applied even where the mortgagee has entered into possession, *Fisher on Mortgage* (4th Ed.), pp 328-9; *Coote.*, (5th Ed.) 1121, and it has been decided that the mortgage does not, by virtue of such entry, become part of the mortgagee's real estate.

The rule in India has also been the same as in England. Yet it cannot be contended that an assignment of a mortgage does not, in the words of the Registration Act, purport or operate to create, assign or transfer an interest in immoveable property. The contrary has, in fact, been often held directly or indirectly in this Court—(See, *inter alia*, *Varudev v. Rama*, 11 Bom. H. C. Rep., 149; *Gopal Narayan v. Trimback Sadashiv*, I. L. R., 1 Bom., 267; *Satra Kumaji v. Visram Hasgavda*, I. L. R., 2 Bom., 97; and *Ganpat Pandurang v. Adarji Dadabhai*, I. L. R., 3 Bom., 313). It is, therefore, necessary, in dealing with the question before us, to go beyond the proposition above set out from Lindley on Partnership, and to consider what is the nature of the rights which the several partners possess in and to the partnership property. Now, the general principle may here again be expressed in the language of Sir N. LINDLEY, who says that, "in the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property." And when it is remembered that a partnership firm is not a distinct *persona* in the eye of the law, but is only a com-

[253] pendious mode of describing the group of individual partners, it seems to follow that any right or interest in immoveable property which is owned by the firm must be divided among the individual partners, whose fractional interests must make up the aggregate vested in the whole firm. Accordingly in *Farquhar v. Hadden*, L. R., 7 Ch., 1, where the testator by his will gave to his surviving partner "all my share of the leasehold premises in which my business is carried on," Sir W. JAMES, L. J., said those words would carry "the interest which the testator had in this property at his death, namely, a right to a moiety subject to the application of the assets of the partnership in payment of the partnership debts." And Sir G. MELLISH added: "It is said that that is an inaccurate description. I do not see that there is in it any substantial inaccuracy. He had an interest in the property subject to the payment of the debts, such an interest as a creditor of his might have taken in execution; that was the interest which he had, and that is what he leaves to his partner." Again in *Ashworth v. Munn*, 15 Ch. D., 363, at pp. 369-70, which was a case of a testamentary disposition in favour of some charity of a partner's share in a mercantile concern, the Lord Justice JAMES, after distinguishing between the case of corporations or quasi-corporations and private partnerships (compare *Baxter v. Brown*, 7 M. and G., 198), observed: "Now it appears to me that in a private partnership which has got land, it is difficult to say that the partner has not got an interest in land." And after discussing the nature of a partner's estate, and pointing out that the share of each of the partners is "not a share in any specific asset or any specific part of the assets real or personal," he went on to say, that "whatever is the amount coming due to that partner, that partner has an immediate or direct charge or incumbrance on that land for that very sum, and his right is to have the land sold for the purpose of realizing that charge or incumbrance which he has upon it." And finally he affirmed the order of the Vice-Chancellor "upon the simple ground that, if not an interest in land, it is at all events a direct charge on land."

[254] BRETT, L. J., in the same case said: "But when you come to the case of an ordinary partnership.....which holds land, one partner cannot dispose of his interest without the consent of the others, and supposing he dies, the partnership is at an end, and it may not be possible to ascertain his interest in the partnership without dealing with the land, which is the property of the partnership, and in which, therefore, he has an interest." And COTTON, L. J., remarked, that "we must consider, whether this is not an interest or charge on land. If a charge then it was an interest." And after discussing how the rights of partners would have to be worked out, he proceeded thus:—"It is, in my opinion, independently of any decision, an interest in land, and we cannot but say that a gift of his interest in partnership property being land, is a gift of an interest in land within the third section of the Statute of Mortmain." All the members of the Court relied upon Lord CHANCELLOR CAIRNS' decision in *Brook v. Badley*, L. R., 3 Ch., 672,--COTTON, L. J., expressly observing that the principle of that decision applied to a share in an ordinary partnership. Lord CAIRNS there had to deal with a will which gave the testator's real and personal estate to trustees with directions to sell the same, and after payment of his debts and certain legacies, to pay £ 3,000 part of the residue to H. Hunt, from whom Miss Pargeter bought it. The Lord Chancellor, affirming the decision of Lord ROMILLY, M. R., held that the legacy forming part of Miss Pargeter's estate was an interest in land within the Statute of Mortmain. And having regard especially to the definition of immoveable property given in the Act, I cannot discover any reason for construing the phrases "immoveable

* Cf. *Mayhew v. Herrick*, 18 L. J., (C. P.), 179, which arose on a *fi. fa.* executed against partnership goods.

property" or "any right, title or interest in immoveable property" in our Registration Act more narrowly than the words "any estate or interest in lands, tenements and hereditaments" used in the Statute of Mortmain*. And it is to be remarked also, that in all these cases the discussion has turned not so much on the signification of the words of the Statute, as on the nature of an individual partner's interest in partnership [256] property. And, therefore, I think that the cases on the Statute of Mortmain are of much value in reference to the point under consideration.

The latest case I have been able to find throwing light upon this question is the very recent case of *Smith v. Gray*, 43 Ch. Div., 208, where KEKEWICH, J., held that a sale of a share in an ordinary partnership owning immoveable property fell within section 4 of the Statute of Frauds, the words of which are "any interest in or concerning lands, tenements and hereditaments." That particular point was not decided by the Court of appeal, but COTTON, L. J., expressed his concurrence in the opinion of KEKEWICH, J. It appears to me that these authorities lead to the conclusion, that where an ordinary partnership owns land for the purposes of the partnership, the interest of each member of the partnership, although not a share in any specific asset or specific part of the assets, and although it would by English law devolve as part of such member's personal estate, must nevertheless be held to be an "interest in immoveable property" within the meaning of our Registration Acts. The case of *Attorney General v. Hubbuck*, 13 Q. B. D., 275, is not inconsistent with this view, as the result in that case, which arose on a claim for Probate Duty on the part of the Crown, could not have been affected by the circumstance that the personal asset dealt with in that case carried with it a right of realization out of real property. Nor is the still more recent case of *Watson v. Black*, 16 Q. B. D., 270, an authority adverse to the conclusion above expressed, but impliedly at least supports that conclusion, because the Court in that case held that on the true construction of the deeds relating to the property there in question, the individual members of the Stock Exchange had divested themselves of the Stock Exchange property, and vested it in trustees "free from any equitable interest" in themselves, retaining "an interest in the profits of the concern only," and, therefore, that they were not entitled to the benefit of the county franchise. The implication seems to be pretty clear, that, if there had not been any such divesting, the members would have had an equitable [256] interest sufficient to warrant their claim. There is no such divesting in the present case. On the other hand, it seems to me that the conclusion above stated is the only one which can be reconciled with such a case as that of *Baxter v. Brown*, 7 Man. and Gr., 198, in which it was held, that if the shares of the partners in the real property belonging to the partnership are of sufficient value, the partners may, notwithstanding the equitable doctrine of conversion of partnership realty into personalty, lawfully claim the right to vote at elections of Members of Parliament. There is no doubt that that case has sometimes been dissented from, but the latest decisions show that the conflict of opinion is not in reference to any point here relevant. And it is still cited as good law by LINDLEY, L. J., in his last edition, see p. 348. On the whole, therefore, I am disposed to hold, that although a partner's share does not include any specific part of any specific item of the partnership property, still where the partnership is entitled to immoveable property, such share does include an interest in immoveable property, and, therefore, every instrument operating to create or transfer a right to such a share requires to be registered

* See also *Crawshaw v. Maule*, 1 Swaust., 508, per Lord ELDON quoted in 7 Man. and Gr. at p. 216.

under our Registration Act. It is true, that the authorities above referred to apply, in terms, only to immoveable property owned by a partnership. But I am, on the whole, disposed to hold that the principle of those authorities also applies to cases where immoveable property is held by a firm, not in full proprietorship, but only by right of mortgage (Comp. Fisher on Mortgages, 4th Ed., p. 512, as to the somewhat analogous case of sub-mortgages). In this particular case, I may mention that the property, in fact, was in the enjoyment of the mortgagees' firm ever since the mortgage, and that it is now in the possession of the plaintiff.

But, then, it is said that these letters and similar informal documents are not instruments at all within the meaning of the Registration Act, and reliance is placed for that argument on certain remarks made in the course of the judgment of the Full Bench in *Waman v. Dhondiba*, I. L. R., 4 Bom., 126, delivered by WESTROPP, C. J. Those remarks, however, it is to be noted, amount to no more than the expression of a doubt, and are made only with reference [257] to "ordinary letters in a negotiation for a purchase of immoveable property." We have not here to deal with any letters of that character, and nothing that we may decide in this case will in any way affect the doubts expressed by the Full Bench. Here we have not even to spell out a grant or contract from any correspondence between two parties; we have only to deal with three letters written by one and the same person to the other party to the transaction, and each in substance merely reiterating what is said in the others. The cases referred to in the argument in *Waman v. Dhondiba* show that in spite of the definition given by Wharton, which is referred to by WESTROPP, C. J., letters have been spoken of by eminent Judges and Masters of the English language like Sir J. KNIGHT BRUCE, and I think I may add Sir W. GRANT, as "instruments." And I should not be prepared to lay it down, that while a document which runs in the form—"This indenture made between A, B of the one part and C, D of the other part" must be registered; the same document need not be registered if it runs in some form like this: "To, A. B., Esquire, Dear Sir ... yours faithfully, C D." I think that the question cannot be properly decided with reference to circumstances like this. I think, too, that a perusal of various sections of the Registration Act seems to show that the Legislature has used the words 'document' and 'instrument' interchangeably. And, further, it is obvious, that if it is once held that a letter, even though it evidences a transaction relating to immoveable property of the nature described in section 17 of the Registration Act, is, notwithstanding section 49, valid to effectuate such transaction even without registration, merely on the ground that it is in form a letter, the whole of the Registration Act may be practically rendered inoperative with the greatest ease. One often meets with vernacular assurances, wills, deeds of gift and deeds of sale, which are cast into the form of letters, but intended to operate as formal legal instruments. See (*inter alia*) *Ramasami v. Ramasami*, I. L. R., 5 Mad., 115; *Safdar Ali Khan v. Lachman Das*, I. L. R., 2 All., 554. Upon these grounds I have come to the conclusion, that we are not bound to give such effect to the remarks of WESTROPP, C. J., above alluded to, as to hold that the letters [258] before us need not be registered on the simple ground that they are letters.

But it was further argued that the letters in question do not themselves operate to transfer any right whatsoever, as they expressly leave it to the addressees to arrange, as they please, about the matters dealt with in the letters. I do not, however, think that that is the true meaning of the passage referred to. I understand it to mean merely that the mode of carrying out the writer's directions is left to the discretion of the addressees, the actual

transfer of interests itself which they direct, being, however, in no way touched by that circumstance. Upon the whole, therefore, I should, if necessary, have been disposed to hold that the letters in question not being registered were rightly treated by the Court below as being inadmissible in evidence to prove directly a transfer of the share of Gangaram in the partnership to Sadaram. It is unnecessary to consider, in this case, whether the transfer might be proved by means of the letters in question only as a transfer of personalty, foregoing the charge in respect of it upon the immoveable property, as was allowed to be done in the case of a transfer of a decree ordering a sale of immoveable property in the case of *Koob Lall Chowdhry v. Nityanund Singh*, I. L. R., 9 Cal., 839. Such a use of the letters, even if allowable, will be of no avail to the plaintiff, who, to succeed in this case, must show a right to the property itself.

The District Judge has treated his finding on the admissibility of the letters as conclusive of the case. He says in his judgment that the plaintiff relies on no other evidence of title than these letters; and, again, that "there being no other evidence of plaintiff's title besides these letters, I am of opinion that his suit must fail." But on this point I am unable to agree with him. It is, I think, quite clear, that even by English law, and in spite of section 4 of the Statute of Frauds, a man may be admitted as a member of a partnership without any document whatever, and this even though the partnership is formed expressly to deal in land." In the case of *Gray v. Smith*, 43 Ch. Div., 208, [259] already cited on another point, Mr. Justice KEKEWICH laid that down, following *Forster v. Hale*, 3 Ves., 696; 5 Ves., 308, and *Dale v. Hamilton*, 5 Hare., 369. And, again, there appears to be no doubt, that the fact of partnership may, if necessary, be proved without producing the deed of partnership (Taylor on Evidence, pp. 377—8; Field on the Indian Evidence Act, p. 408). It seems to me, therefore, that it is open to the plaintiff to rely on the evidence referred to by the Subordinate Judge, to show that his father was at first admitted as a partner, and subsequently treated as a partner, and that as such partner the mortgages in question here ultimately fell to his share at the final division. And this the plaintiff can show, without even producing the letters dealt with above, or, if necessary, the letters may probably be admissible as either corroborating the plaintiff's story, or as rendering it probable that his father was, in fact, admitted as a partner. If and when the position of the plaintiff's father as a partner is thus established, his right to the property follows, as the Lord Chancellor said in *Forster v. Hale*, by operation of law, and no other proof of title is required. In this case, there appears to be no room for doubting that the plaintiff's father was, in fact, admitted as a partner. The District Judge, it seems pretty clear, was on that point of the same opinion as the Subordinate Judge. And, therefore, I think it is not necessary, as it would otherwise have been, to send the case down to the Court below for a finding on that point. But assuming that Sadaram did become a partner, and that by virtue of the divisions between the partners and the other transactions referred to by the Subordinate Judge the plaintiff is now the rightful representative of the original mortgagees, I think he is clearly entitled to relief in this suit. And it is unnecessary to consider any of the other points raised by Mr. Chaubal in argument in support of the appellant's case.

The question, however, remains what is the relief which the plaintiff is now entitled to. As mortgagee in possession his right was to have the attachment on the property itself removed—*Kassirav v. Vithaldas*, 10 Bom. H. C. Rep., 100. But it appears that the attachment was not removed by the Courts below, and

* Lindley on Partnership (5th Ed.), 81—2 (where *Dale v. Hamilton* is said to have gone to the extreme verge of the law).

the property was in [260] fact sold. Under these circumstances, the plaintiff is now entitled only to a declaration, that he has a good and valid mortgage on the property, the subject-matter of the suit, for the amounts justly due and owing on foot of the mortgages of the 25th July 1866, and 19th September 1870, respectively, and that by virtue of the execution sale to the defendants Nos. 2 and 3 they are only entitled to the said property subject to such mortgages. There is no prayer for an account of the mortgages to be taken, or for a foreclosure or sale. And accordingly no relief of that nature can be given in the present suit. I am, therefore, of opinion, that the decree of this Court must be that the decree of the District Judge should be reversed, and a declaration made as above set forth, and that the respondents should pay the appellant the costs of the suit and of both appeals.

Decree reversed.

NOTES.

[See, however, 30 Cal., 1016 P. C. ; also 20 M.L.J., 555.]

[17 Bom. 260]
FULL BENCH.

APPELLATE CRIMINAL.

The 19th December, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS,
AND MR. JUSTICE TELANG.

Queen-Empress
versus
Bana Punja and others.*

Penal Code (Act XLV of 1860), Secs. 71, 148, 149, 326—sentence—separate sentences for rioting and grievous hurt.

When a prisoner is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of section 149 of the Indian Penal Code, it is not illegal to pass two sentences, one for riot, and one for hurt; provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences.

When, however, the accused is guilty of rioting, and is also found to have himself caused the hurt, he may be punished both for rioting and for hurt.

In such a case the total punishment can legally exceed the maximum which the Court might pass for any one of the offences.

Queen-Empress v. Ram Sarup, I. L. R., 7 All., 757, approved.

THIS was a reference to the Full Bench.

[261] The accused Bana Punja and nine others were committed to the Court of Session on the following charges:—

(1) For having on the 9th June 1891, joined an unlawful assembly armed with deadly weapons (Penal Code, section 14).

* Criminal Appeal, No. 101 of 1892.

(2) For rioting armed with deadly weapons (Penal Code, section 148).

(3) For voluntarily causing grievous hurt by dangerous weapons (Penal Code, section 326).

The Joint Sessions Judge of Kaira convicted all the accused of the offence of voluntarily causing grievous hurt with dangerous weapons, and sentenced, under sections 326 and 149 of the Indian Penal Code, accused No. 1 to three months' rigorous imprisonment and the rest to six months' rigorous imprisonment.

Accused Nos. 1, 5, 9 and 10 were also convicted of the offence of rioting, armed with deadly weapons, and sentenced, under section 148 of the Indian Penal Code, accused No. 1 to three months' rigorous imprisonment and the rest to eighteen months' rigorous imprisonment.

Accused Nos. 2, 3, 4, 6, 7 and 8 were also convicted of rioting and sentenced, under section 147 of the Indian Penal Code, to six months' rigorous imprisonment.

The sentences for each of the offences were to begin one upon the expiration of the other.

Against these convictions and sentences the accused appealed to the High Court, contending (*inter alia*), that the cumulative sentences under sections 147, 148 and 326 were illegal, and contrary to section 71 of the Indian Penal Code.

Chitgupi (with him *Shivram V. Bhandarkar*) for the Accused.

Starling (with him *Rao Saheb Vasudev J. Kirtikar*, Government Pleader) for the Crown.

The following authorities were referred to in argument :—

Empress v. Ram Partab, I. L. R., 6 All., 121; *Nilmony Daddar v. Queen-Empress*, I. L. R., 16 Cal., 442; *Queen-Empress v. Bisheshar*, I. L. R., 9 All., 645; *Queen-Empress v. [262] Sakharan Bhai*, I. L. R., 10 Bom., 493; *Ferasat v. Queen-Empress*, I. L. R., 19 Cal., 105; *Reg. v. Tukaya*, I. L. R., 1 Bom., 214; *Queen-Empress v. Dungar Singh*, I. L. R., 7 All., 29; *Queen-Empress v. Ram Sarup*, *ibid.*, 757.

The case was argued before a Division Bench composed of JARDINE and TELANG, J.J., who made the following reference to a Full Bench.

JARDINE, J.:—This appeal has been fully argued; and we see no reason to differ with the view of the facts taken by the Joint Sessions Judge and the Assessors. The defence of *alibi* has not been made out. The object for which the prisoners assembled was unlawful. This was to enforce a right, or supposed right, to take earth from a dry tank by a show of force: and, as the Joint Sessions Judge remarks, it is immaterial, in point of law, whether the right existed or not—*Ganouri Lal Das v. Queen-Empress*, I. L. R., 16 Cal., 206. They have all been rightly convicted of rioting, and the prisoners Nos. 1, 5 and 9, who had swords, and No. 10, who shot an arrow, under section 148 of the Penal Code. One man, Pattar Nathu, was killed by a person not yet arrested: the witnesses Sona and Mundas, (exhibits 17 and 30), each had bones fractured, and Gaman and Jhala (exhibits 19 and 22) received wounds said by the hospital assistant to be dangerous to life. The murder of Pattar is found by the Judge to be the act of one man, and not done in pursuance of the common object of the rioters. The other four persons above mentioned received injuries which are grievous hurts: and as some of them were caused by swords, and all of the prisoners were rightly held guilty of them under section 149 of the Penal Code, they were all rightly convicted under section 326.

They, were not specifically charged with causing any of these different hurts, nor were those of the prisoners, who are alleged to have caused these different hurts, specifically charged with so doing, although there is evidence as to how, and by whom, these different hurts were caused, as also regarding other hurts, not grievous, caused to other persons by these rioters. No objection [263] has been made that the prisoners have been prejudiced, nor has any objection on matter of law been taken to the convictions. The committing Magistrate and the Joint Sessions Judge appear to have assumed that as section 149 applied to the case, it was unnecessary to put specifications into the charge.

But, as regards the sentences passed, Mr. Chitgupi, as counsel for the appellants, urged that although a sentence under section 326 of the Penal Code is legal, and one under section 147 or 148 is legal, on the Judge's view of the facts, it was illegal to pass sentences on the same person under both section 326 and section 147 or 148. This procedure, he argued, is contrary to section 71 as interpreted in the case of *Empress v. Ram Partab*, I. L. R., 6 All., 121, and by the majority of the Full Bench in *Nilmony Poddar v. Queen-Empress*, I. L. R., 16 Cal., 442. Mr. Starling, who appeared for the Crown, cited *Queen-Empress v. Bisheshar*, I. L. R., 9 All., 645, and *Ferasat v. Queen-Empress*, I. L. R., 19 Cal., 105. He also referred to *Queen-Empress v. Sakharam Bhanu*, I. L. R., 10 Bom., 493. During the hearing the Court referred to the following cases:—*Regina v. Tukaya*, I. L. R., 1 Bom., 244; *Queen-Empress v. Dungar Singh*, I. L. R., 7 All., 29; *Queen-Empress v. Ram Sarup*, I. L. R., 7 All., 757, and *In the matter of the petition of Kāli Roy and others v. The Queen-Empress*, I. L. R., 16 Cal., 725.

In the case before us, the total punishment inflicted on each prisoner is less than the maximum which may be imposed under section 326. We have now to consider the decisions above mentioned. In *Ram Partab's case*, STRAIGHT, J., noticed that there was no evidence that the prisoners individually inflicted grievous hurt upon any person, and he says "it is only by praying in aid the provisions of section 149 of the Indian Penal Code that he can be held responsible for the injuries inflicted on the parties assaulted by the other members of the unlawful assembly with which he was associated." He held the sentence for the hurt under section 325 legal, but considered that the prisoner was made statutorily responsible for the hurt inflicted by another [264] man's hand, under section 149, as the prisoner was at the time "member of the unlawful assembly." But as membership of the unlawful assembly enters into the definition of rioting, he held the sentence under section 147 for rioting to be illegal, although the total punishment did not exceed the maximum under section 325.

In *Queen-Empress v. Dungar Singh*, I. L. R., 7 All., 29, Mr. Justice BROOMFURST dissented entirely from these views, and pointed out that they were contrary to the previous decisions and the practice. After reviewing the differences between section 454 of the Criminal Procedure Code of 1872 and section 235 of the Code of 1882, the effect of section 35 thereof and the amendment made in section 71 of the Penal Code, that learned Judge observed at page 34: "The offence of rioting and the offences of voluntarily causing hurt and voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences. The offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the two other mentioned offences." He held also that the prisoner might receive the cumulative sentences, the

various maximum imprisonments as awardable under each of the sections 148, 323 and 326, the offence against the public tranquillity in rioting being different in kind from the injuries inflicted on individuals. He noticed that the word "punished" had been omitted from section 235 of the Criminal Procedure Code, and adopted the reasoning of Mr. Mayne that the rules about assessment of punishment are now to be sought in section 71 of the Penal Code. The same view has been adopted by this High Court in *Queen-Empress v. Sakharām Bhau*, I. L. R., 10 Bom., 493, which case has been followed here ever since and accepted by two other High Courts, I. L. R., 10 All., 146, and I. L. R., 12 Mad., 36. As one of the Judges in that case, I would express my opinion that it supports the view of BRODHURST, J., although it is to be noticed that illustration G, which allows separate convictions under sections 147, 325 and 142 of the Penal Code, is, [265] in both the Procedure Codes of 1872 and 1882, an illustration of the first paragraph of section 454 of the one and section 235 of the other.

In *Queen-Empress v. Ram Sarup*, I. L. R., 7 All., 757, where the separate convictions under sections 147 and 325 did not, when combined, exceed the maximum under either, BRODHURST, J., adhered to his opinion in the earlier case. The majority of the Bench (PETHERAM, C. J., STRAIGHT and TYRRELL, JJ.) allowed the sentences to stand, distinguishing the case from that of *Ram Partab* on the ground that the hurt committed by the sentenced prisoner with his own hands was a distinct offence, "separate from and independent of the offence of riot, which was already completed. The fact of the riot, was not an essential portion of the evidence necessary to establish their legal responsibility under section 325 of the Penal Code."

In *Queen-Empress v. Bisheshar*, I. L. R., 9 All., 645, decided by Sir J. EDGE, C. J., and BRODHURST, J., the whole subject is discussed by the Chief Justice. The case is very like the present, and the total sentences under sections 147 and 325 were within the maximum of section 325. They were held to be legal. The Court considered that section 71 did not apply. The judgment seems to hold, as I do, that in *Ram Partab's case*, STRAIGHT, J., treated the word "punishment" in section 71 as equivalent to "sentence." The Chief Justice points out that the Legislature does not use the word "sentence." Alluding to the illustrations to section 235 of the Procedure Code, he remarks: "There would be little use in inquiring into and convicting an accused person of two offences if he could be legally sentenced for one only." He mentions that *Regina v. Tukaya*, I. L. R., 1 Bom., 214, has a bearing on the case. Even if section 71 of the Penal Code were applicable, the total punishment being within the limit allowed was legal, as has been urged in the present case by Mr. Starling. But Sir JOHN EDGE holds that section 71 does not apply at all, seeing that section 149 does not, in his opinion, create any offence, but is, like section 34, merely declaratory of a principle of the common law of England, and differs in principle from section [266] 396, relating to dacoity with murder, which does create a substantive and distinct offence. Compare section 114 with the reasons for the doctrine given in Plowden's Reports, p. 97. The strong inclination of my opinion is to Sir JOHN EDGE's view. Section 149 follows Lord HOLT's judgment in *Plummer's case*, reported in Kelynge and discussed in Foster's Crown Law, 353. Also Mr. Justice FOSTER's charge at the trial of William Jackson, 18 Howell's State Trials, 1069.

I am of opinion that, if we follow Sir JOHN EDGE and BRODHURST, J.'s views of the law, we must hold that the words about punishment in section 71 are not equivalent to directions about mere sentences; that section 71 is not applicable, and that, even if it does apply, the punishments inflicted are below

the maximum, and, therefore, legal. I have found no reported decision of this Court, but in Criminal Appeal, No. 217 of 1889*, SCOTT and CANDY, JJ., followed *Ram Partab's case* and reversed a sentence for rioting, although the total punishment was within the limit allowed for the hurt. No Madras case has been cited.

It remains to consider the decisions at Calcutta. In *Loke Nath Sarkar's case*, I. L. R., 11 Cal., 349, TOTTENHAM and GHOSE, JJ., held that section 71 did not apply. There the several hurts had been inflicted in the riot, and the convictions were under section 148, section 324 read with section 149, and section 324 for hurt caused by a particular prisoner. The aggregate punishment of the appellants exceeded the limits of section 324 and section 148. The separate sentences were upheld, following *Queen-Empress v. Durgar Singh*. At page 353 the learned Judges say :—

"It seems to us that the present case does not come within the purview of section 71. The offences, of which the prisoners have been convicted, are distinct: (1) rioting armed with deadly weapons; (2) voluntarily causing hurt with a dangerous weapon to Kamala Kant Poddar; (3) a similar offence with regard to Joydhar.

"The several acts, in support of which the prisoners were charged, do not, in combination, form any other offence defined [267] by any law with which we are acquainted; nor do they fulfil any other condition of section 71, which would protect the accused from more than one punishment, or limit the severity of the sentence passed upon them.

"If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding; for rioting was being committed before the hurts were inflicted on the two men wounded.

"We note that the view of the law which we have taken was adopted by the High Court at Allahabad in the recent case of *Queen-Empress v. Durgar Singh*."

In *Nilmony Poddar v. Queen-Empress*, I. L. R., 16 Cal., 442, the appellants were sentenced under section 148 to three years' imprisonment and under section 324 coupled with section 149 to one year. The aggregate thus exceeded the limit of either section. They had not by their own hands caused any hurt. The majority of the Full Bench (PETHERAM, C. J., MITTER, PRINSEP and WILSON, JJ.) followed *Ram Partab's case*, and held that paragraph 1 of section 71 applied, and set aside the sentences of one year. They appear to treat section 149 as an ingredient in the offence punished by section 324 coupled with section 149. The case of *Queen-Empress v. Bisheswar* does not appear to have been brought to the notice of the Court. TOTTENHAM, J., differed from his colleagues and held that section 149 did not make a divisible part of the offence under section 324, and that it did not define or make punishable any specific offence. He evidently treats section 149 as a mere declaration of a doctrine of law or legal principle.

In *Mohur Mir's case*, I. L. R., 16 Cal., 725, one prisoner, Kali Roy, had been sentenced under sections 147 and 323 to a punishment higher than either section provides. The Court (TREVELYAN and BEVERLEY, JJ.) upheld the sentences on the authority of *Ram Sarup's case*, as the prisoners had individually committed the hurts.

[268] The latest case is *Ferasat v. Queen-Empress*, I. L. R., 19 Cal., 105, decided by BEVERLEY and AMER ALI, JJ. The report is not very clear, and

* Criminal Ruling 63 of 21st Nov. 1889, Col. 154 of Ranghoolal's Criminal Rulings.

there is no mention of section 149. What is said at pages 110 and 111 seems to show that the prisoners sentenced under sections 148 and 332 to a punishment exceeding the maximum provided for either offence had individually committed the hurt. The Court held that section 71 had no application, and that the sentences were legal. The ruling follows *Ram Partab's case* in holding that separate sentences may be passed for rioting and hurt when the person sentenced did individually commit the hurt. It follows *Loke Nath's case* in holding that in such a case the minimum aggregate provided by section 71 is not an obligatory minimum.

The result of the decisions seems to be as follows:—Sir J. EDGE, C. J., BRODBURST, TOTTENHAM and GHOSE, JJ., considered that rioting and hurt are distinct offences; that it is immaterial whether section 149 is called in or not, and section 71 does not apply at all either to prohibit two separate sentences or to impose a minimum on the total of punishment. The cases are *Dungar Singh's*, *Bisheshwar's* and *Loke Nath's*.

Mr. Justice STRAIGHT in *Ram Partab's case* went the length of holding separate sentences illegal when the conviction for hurt depended on section 149, even though the minimum punishment allowed by section 71 had not been exceeded. No other reported case has gone so far.

Sir C. PETHERAM, C. J., STRAIGHT, TYRRELL, MITTER, PRINSEP and WILSON, JJ., limit the application of *Ram Sarup's case* to cases where section 149 has to be called in, and do not apply section 71 to the prisoner, who, during the riot, has himself committed the hurt. The cases are those of *Ram Sarup* and *Nilmony*. TREVELLYAN, BEVERLEY and AMEER ALI, JJ., agree in the non-application of section 71 where the rioter sentenced has himself inflicted the hurt. See *Mohur Mir's* and *Ferasat's cases*.

In *Loke Nath's case*, a view of the law is stated as follows:—"If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, [269] then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding; for rioting was being committed before the hurts were inflicted on the two men wounded." This proposition is not assented to in *Mohur Mir's case* and is distinctly dissented from by Sir JOHN EDGE at page 651 of the report, I. L. R., 9 All., in *Bisheshwar's case* for reasons which at present commend themselves to me. I do not think it necessary to consider the proposition in determining the present case, as it has not been put forward as a defence for any of the prisoners. Neither has it been argued. I would add, however, that force and violence have not the same meaning as, and are not commensurate with, the word "hurt" in the Indian Penal Code, and that probably the burden of proving a fact exempting from ordinary punishment, an accused person guilty of both riot and hurt,—I mean a fact bringing the case within section 71, assuming that section to apply,—would lie on the accused person under section 105 of the Evidence Act.

The inclination of my opinion is to hold that the words in section 71 of the Penal Code about punishment are not equivalent to prohibitions of separate sentences: that section 71 does not apply at all either to forbid two sentences, one for the hurt and one for the riot, or to require that the total punishment shall not exceed the maximum of one offence: that it matters not in this regard whether the prisoner did the hurt with his own hand, or is found guilty by applying the doctrine of section 149.

But as learned Judges in the High Courts at Calcutta and Allahabad have differed in their views of the law, and the questions are of great importance

and frequently occur in cases like the present, I think we should refer the following points of law to a Full Bench before we determine the appeal:—

1. Whether where the prisoner is convicted of rioting and of hurt, and the conviction for hurt depends on the application of section 149 of the Indian Penal Code, it is illegal to pass two sentences, one for rioting and one for hurt?

2. Whether in such a case the two sentences are legal, provided the total punishment does not exceed the limit which the Court might pass for any one of the offences?

[270] 3. Whether the two sentences are legal where the prisoner sentenced is proved to have himself caused the hurt?

4. Whether in such a case the total punishment can legally exceed the limit which the Court might pass for any one of the offences?

TELANG, J. :—I concur in the proposed reference to a Full Bench.

The judgment of the Full Bench (SARGENT, C. J., PARSONS and TELANG, JJ.) was delivered by

Sargent, C. J. :—We think that the first and third questions should be answered in the affirmative. This is quite independent of the question whether the case assumed by the first question falls under section 71 of the Penal Code, as we agree in the view taken by Mr. Mayne, at page 44 of his Commentaries on the Penal Code, of the combined effect of section 71 of the Penal Code and section 235 of the Criminal Procedure Code, viz., that the assessment of punishment is to be found in the former section in cases falling within it; but the latter determines the procedure quite independent of it, and this Court has already ruled that, in case of separate convictions for two distinct offences in the same case, the proper course is to pass a separate sentence for each offence, (Cr. Rul. No. 17, dated 28th March 1892). With respect to the second and fourth questions, they turn upon the meaning to be given to section 71 of the Penal Code.

As to question 2, it can only be answered in the affirmative; whether section 71 of the Penal Code be thought applicable to the case as was held by the Allahabad High Court in *Empress v. Ram l'artab*, I. L. R., 6 All., 121, and the Calcutta High Court in *Nilmony Poddar v. Queen-Empress*, I. L. R., 16 Cal., 442, or not applicable as was held by Sir JOHN EDGE, C. J., in *Queen-Empress v. Bisheshar*, I. L. R., 9 All., 645. Question 4 must be answered in the affirmative. We agree in the decision in *Queen-Empress v. Ram Sarup*, I. L. R., 7 All., 757.

NOTES.

[1. Where the accused did the act himself, there may be separate punishments, according to 7 All., 414; 757; 9 All., 645; 16 Cal., 442; 725; but not according to 3 C.W.N., 174; 4 C.W.N., 245; 8 C.W.N., 395; 483.

2. If the guilt can be established only by the aid of sec. 149, there may be separate punishments according to 9 All., 645; 17 Bom., 260; (1894) P. R., 31; (1895) P. R., 8; (1914) 25 I.C., 633; but not according to 16 Cal., 442; 3 C.W.N., 174; 3 C.W.N., 761; 8 C.W.N., 344, which also lay down that sec. 71 controls them.]

[271] APPELLATE CIVIL.

The 8th February, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Damodardas Maneklal and others.....(Original Defendants Nos. 1—4)

Appellants

versus

Uttamram Maneklal and others.....(Original Plaintiff and Defendants Nos. 5 and 6) Respondents.*

Hindu law—Partition—Manager—Liability of "manager to account on occasion of partition—Right of members who were minors at time of management to an account from manager—Manager also guardian of minors—Nature of account to be rendered by a manager on partition—Family idol and property appertaining thereto goes on partition to senior member of family—Right of mother to a share of estate on partition.

A manager of a Hindu family cannot refuse to render any account whatever of his management on the occasion of a partition, or require the other members of the family to accept his *ipse dixit* as to the property subject to partition. What that account should be so as to discharge him from his liability to account as manager, and what objections the other members of the family can take to it, must depend on the conduct of the manager and the other members of the family, the nature of the property, and the circumstances of the family, and cannot be stated in definite terms. Members who were minors during the management cannot be taken to have consented to the management, and are entitled, when they attain their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interests; the presumption, however, being that, in the absence of evidence, the property for partition is such as it exists at the time of the suit for partition.

A brother sued his three brothers for partition of their father's estate, which consisted of moveables and immoveables and a banking business. As senior member of the family he also claimed the *rajseva* (family idol) and the property appertaining to it. The mother (Kashi) of the first three defendants and Manchha, the widow of a deceased brother of the plaintiff, and Nandkore, his aunt, the widow of his father's brother, were also defendants to the suit. The three brothers (defendants Nos. 1, 2 and 3) alleged that their father, Maneklal, had died in 1864 at which time they were minors; that the plaintiff had managed the estate ever since and had, in 1865, obtained a certificate of guardianship and administration to their estate under Act XX of 1864; that the plaintiff's management had been fraudulent, improper and wasteful and prejudicial to their interests as minors; and they contended that they were entitled to an account from him of the property at the date of their father's death and of the proceeds, income and profits from that date to the date of suit. They contended that as the plaintiff had been appointed administrator of their estate under Act XX of 1864, he was liable to account to them as a trustee, and was bound to show that all sales, purchases and other transactions entered into by him were necessary and for their benefit. The lower Court held that the family being united, the Minors Act did not apply, [272] and that the fact that the plaintiff had obtained a certificate of guardianship did not enlarge his liability to account, and that, on the authorities, the manager of a Hindu family was not bound to account for past transactions, nor for mesne profits, unless in cases of fraud or gross extravagance, and

* Appeal No. 48 of 1890.

that the state of the family property as it existed at the time of partition was to be the basis of the distribution.

On appeal to the High Court,

Held that the defendants were entitled to an account from the plaintiff, and that it was open to them to raise objections with regard to the plaintiff's management.

Held, also, as to the nature of the account which the plaintiff should render of past transactions, that, having regard to the circumstances of the family and the nature of the family property, the plaintiff, in producing the books of the firm since the father's death, which contained an account of all transactions relating to the firm's property and of the moveable and immoveable property, had done all that he could be expected to do, whether as the family manager or as certificated administrator of the defendants' interests in the family property.

Held, also, that the circumstance that the plaintiff had obtained a certificate of administration of the estate of the minors, and sold their interests in certain houses, without the consent of the Court, could not give them a counter claim against the plaintiff unless they proved that they had been prejudiced by the sale. As to ornaments purchased since the death of the father, it was directed that they should be brought into hotchpot by all the parties in making the partition. As to remissions of tenants' rent and compromises of suits, although a considerable loss was shown to have resulted from them, it was held that the defendants had failed to show that they were improper or uncalled for, and there was no evidence to make the plaintiff himself liable for them, or to forbid their being transferred to the general account. The losses in trade also were properly debited to the general business of the firm, and the plaintiff was not personally liable for them.

Held, also, that the plaintiff was entitled to take the *rajseva* (family idol) and keep it with the property appertaining thereto as the family idol and the property thereof, with liberty to such members of the family as are or shall become *marjadas* to have access to it for the purpose of worship.

Held, also, that Kashi, the mother of the first three defendants (step-mother of the plaintiff), was entitled on this partition to one-fifth share in the estate.

THIS was a first appeal from the decision of Khan Bahadur B. F. Modi, Subordinate Judge of Surat.

Suit for partition filed in 1886.

The plaintiff was the son of one Maneklal, who died in July 1864. Maneklal left six sons, viz., the plaintiff and Chhaganlal and Dayabhai by his first wife, and Damodardas, Vizbhukandas and Parshotandas (defendants Nos. 1, 2 and 3, [273] by his second wife (defendant No. 4). At the time of Maneklal's death the first three defendants were minors and the family was then living as a united family. Dayabhai separated in May 1868, and died in 1872, and Chhaganlal died in May 1881. His widow, Manchha, was the fifth defendant in this suit.

The plaintiff claimed a fourth share of the family property, which included immoveable and moveable and also a banking business carried on in the name of Govindram Gosai. As the senior member of the family he also claimed the property appertaining to the *rajseva* (the family idol).

The defendants did not object to a partition, but they alleged that after their father's death in 1864 the plaintiff and Chhaganlal and Dayabhai took possession of the family property, and had the management of it, and they contended that no division should be made until an account had been rendered of the property at Maneklal's death and of the dealings with it and of the profits accrued since that time up to the date of suit. They further charged that the plaintiff, who had obtained a certificate of guardianship and administration of the estate on 17th March 1865, had been guilty of waste and of

fraudulent and improper management, the details of which they set forth in their written statement.

The Subordinate Judge framed twenty-four issues. He found (*inter alia*) that the plaintiff had not been guilty of fraud or negligence in managing the estate, and that he was not bound to account for past transactions, and that the estate should be divided into four equal shares among the plaintiff and defendants, and he prescribed the mode in which the account should be taken. He awarded separate maintenance, at the rate of Rs. 100 a month, to each of the three widows—Krishna *alias* Kashi, Manchha, and Nandkore—and he held that the plaintiff was entitled to the *rajseva* and the property appertaining thereto.

Defendants Nos. 1, 2 and 3 appealed.

Shantaram Narayan, Government Pleader, (with *Shivram Vithal Bhandarkar*) for the Appellants:—The plaintiff, having [274] undertaken the position of an administrator, is bound to give an account of past transactions—*Konerrav v. Gurrav*, I. L. R., 5 Bom., 589.

[SARGENT, C.J.:—Must you not bring a separate suit under the Minors Act?]

Though this is not a suit under the Minors Act (XX of 1864), still as the plaintiff was the manager of the family concern consisting of trade and other moveable and immoveable property, he is liable to render a strict account. The plaintiff was appointed administrator under the Minors Act, and, therefore, on this ground also he is liable to account as a trustee. He could not alienate property without sanction of the Court.

The plaintiff having taken upon himself the active management of the family affairs has rendered himself liable to give a strict account of his management—*Abhayachandra Roy v. Pyarimohan*, 5 Beng. L. R., 347; *Jugmohandas v. Sir Mangaldas Nathubhoy*, I. L. R., 10 Bom., 528.

Further, we contend that Krishna *alias* Kashi, the mother of the defendants Nos. 1, 2 and 3, is entitled to a separate share. The Subordinate Judge misunderstood her claim. She claimed a separate share in the property, and not merely maintenance—*Damoodur Misser v. Senabuttu Misran*, I. L. R., 8 Cal., 537; *Lakshman v. Satyabhamabai*, I. L. R., 2 Bom., 494. Not only a mother, but a step-mother is also entitled to a share. The term "mother" includes a "step-mother"—*Mitakshara*, Ch. I, s. 7 pl. 1; *Viramitrodaya*, p. 80. This view is also confirmed by the *Vyavahar Mayukha*, Ch. IV, s. 4, pl. 18 and 19. The following authorities were referred to:—*West and Buhler*, pp. 360, 820, 824; *Steele on Castes and Custom*, pp. 48, 49 and 56; *Second Appeal No. 346 of 1889*, decided on the 12th June 1890; *Mahabeer Persad v. Ramyad Singh*, 12 Beng. L. R., 90; *Pursid Narain Sing v. Honooman Sahay*, I. L. R., 5 Cal., 845; *Sunder Bahu v. Manohur Lal*, 10 Cal. L. R., 79; *Sumrun Thakoor v. Chunder Mun Misser*, I. L. R., 8 Cal., 17; *Kishori Mohun Ghose v. Moni Mohun Ghose*, I. L. R., 12 Cal., 165; *Lakshman Ramchandra v. Satyabhamabai*, I. L. R., 2 Bom., 494; *Bilasc v. Dina Nath*, I. L. R., 3 All., 88.

[275] We have no objection to the plaintiff retaining the *rajseva* (family idol) during his lifetime, but he cannot alienate it. It should be kept apart from his share in the family property.

Rao Sahib *Vasudev Jagannath Kirtikar* for Respondent No. 1 (plaintiff *Uttamram Maneklal*):—The family being undivided, we dealt with the property in our capacity as manager, and cannot be called upon to render an account. We deny that our conduct has been fraudulent, or that we have mismanaged the property. The appellants are entitled to a division of the property as it exists at the time of partition, and they cannot ask for an account—*Konerrav v.*

Gurav, I. L. R., 5 Bom., 539, at p. 593. The fact that we obtained a certificate of administration under the Minors Act (XX of 1864) cannot enlarge our liability to account as manager.

So far as the Bombay Presidency is concerned, the right of a mother to share with her sons on partition is nowhere recognized. There is no decision which shows that she is entitled to a share. She is only entitled to maintenance. Even if according to the texts she is entitled to a share, her right has become obsolete, and in Bombay no mother claims a share: see Mendlik's vernacular edition of the Vyavahar Mayukha. If a mother's right to a share is not now recognized, much less can that of a step-mother. Even so far back as 1820 a mother was held to be entitled to maintenance in dispute between sons for partition—*Muncha v. Brijhookun*, cases decided by the Salar Divani Adalat, Bombay, 1820-1840, p. 1. The word "mother" does not include a step-mother—*Bai Daya v. Natha Govindlal*, I. L. R., 9 Bom., 279. There can be no objection to maintain a step-mother, but her maintenance would be a charge upon the property which would go to her sons, and not step-sons. *Kedar Nath v. Hemangini Dassi*, I. L. R., 13 Cal., 336. This leads to the inference that, even supposing that a mother is entitled to a share, she should share equally with her sons only, and not the step-sons. As the plaintiff is the senior member of the family, he is entitled to the *rajs-vat*. He gives up his claim to the property appertaining to it.

Dhondu Moroba Sanggiri, for Respondent No. 3 (Bai Nandkore).

[276] **Sargent, C J** :—One Maneklal Govindram died in 1920, on 23rd July 1864, leaving three sons, the plaintiff, Chhaganlal and Dayabhai, by his first wife, and three sons, Damodardas, Vibhukandas and Parshotundas, who are the three first defendants, and were minors at the time of his death, by his second wife, the defendant No. 4. The family were living in union at the time of his death and continued so until Dayabhai separated on 5th May 1868. Dayabhai died in 1872 (*Samvat* 1928) and Chhaganlal in *Samvat* 1937, on the 14th May 1881. The first defendant, Damodardas, after attaining his majority also separated from the family on 4th September 1869 after executing a release (*fargati*). However, on 9th September 1872, he filed a suit to have it set aside, which suit was dismissed by the Court of First Instance, but on appeal was granted by the High Court on the 25th September 1878, with a declaration that Damodardas and the defendants in that suit continued to be members of a united Hindu family.

The plaintiff by the present suit, brought in 1886, seeks for a division of the family estate and to have possession of his share after making provision for the maintenance of the defendants Nos. 4 and 5, widows of Maneklal and Chhaganlal. Defendants Nos. 1, 2 and 3 by their written statement allege that after their father's death the plaintiff with Chhaganlal and Dayabhai took possession and had the management of the family estate, which included moveable and immoveable property and also a banking business carried on in the name of Govindram Gosai, and they contend that no division can take place until an account has been rendered of the family property at the time of their father's death, and also of what the same may have produced, either by sale or annual income, or by the profits of the said business from the time of their father's death until the date of suit. They also charge that the plaintiff, who obtained a certificate of guardianship and administration of their estate on 17th March 1865, committed unauthorized acts prejudicial to their interests as minors, and also since they attained majority has committed acts with the fraudulent object of injuring them, the nature of which they set out in detail in their written statement. Nandkore, widow of Pranjivandas Govindram uncle of the parties, was subsequently on 2nd April 1889, made a party as the sixth defendant.

[277] The Court below has framed twenty-four issues, of which the 19th and 23rd raise the questions as to the liability of the plaintiff to account and the extent and nature of that liability whether as guardian or as manager of the family estate. It was contended by the defendants Nos. 1, 2 and 3 that, as the plaintiff was appointed administrator of their estate under Act XX of 1864, he was liable to account to them as a trustee, and was bound to show that all sales, purchases and other transactions entered into by him were necessary and for their benefit. The Court below held, on the authority of *Shivji v. Datu*, 12 Bom. H. C. Rep., 281, that as the family was united, and the Minors Act had no application to the minors, the circumstance of the plaintiff having obtained a certificate of administration under the Minors Act did not enlarge his liability to account as manager of the family, as to which it held that the authorities showed that the manager is not bound to account for past transactions, unless in case of fraud or gross extravagance, nor to account for mesne profits, and that the state of the family property as it exists at the time of the partition is alone to be the basis of the distribution; that the manager must lay an account of the property as it exists at the time of partition, and, unless the other members can show, at least by a few instances or otherwise, that there has been fraud or gross misconduct or gross extravagance or gross disproportion as to the expenses of the different members, past transactions cannot be re-opened. The lower Court held that the defendants had failed in proving fraud or misappropriation or gross extravagance, and that the plaintiff was, therefore, "not bound to explain past transactions or to account for mesne profits", but at the same time "that he must submit an account of the transactions themselves, so far as he could, and, if possible, from the death of his father in 1864," as to which the Court held that he had discharged his obligation by producing all the account books, including day books, ledgers, *samadaskhats* and *nonds* from *Samvat* 1920 (A. D. 1864) to *Samvat* 1942 (A. D. 1896). In answer to this account defendants presented 14 statements, I N to J A based on the account books themselves, and which were used by the Subordinate Judge in connexion [278] with the various objections set out in detail in paragraph 19 of the written statement.

Owing to the peculiar constitution of an undivided Hindu family, which renders it difficult to define with precision the legal position which the manager of the family holds relatively to the other members, the nature and extent of his responsibility have, as might be expected, given rise to much difference of opinion. In *Ranganman v. Kashinath*, 3 Beng. L. R. (O. C. J.), 1, Mr. Justice MARKBY laid it down broadly that a member of the family, who takes upon himself the active management of the family affairs, does not thereby render himself liable to render to the rest of the family an account of his management. However, a Full Bench of the Calcutta High Court, in which Mr. Justice MITTER took part, declined to adopt Mr. Justice MARKBY's view of the manager's position, and held that the manager was bound, in equity and good conscience, to account for his management, and would be liable to a suit if he did not do so. This decision, however, leaves the question still open as to the nature of the account which the manager must render, and which Mr. Justice MITTER admitted would be different from that of a managing member of an ordinary partnership. In *Bombay, WEST, J.*, after remarking that in the absence of fraud and gross misconduct, the object of such an account is simply to determine the nature and value of the property, says in *Meghashan v. Vithalrao*, S. A. 148 of 1871, 14th September 1871: "The manager is not a trustee required, as in ordinary case of trustee, to keep accounts of his own expenditure, or of that of the ordinary members, or of

supplies taken out of the common stock. The remedy for his misconduct is his deposition or partition, in which an adequate account can in general be taken." "Mr. Justice WEST is here speaking of the manager's liability to a suit for an account, and we do not understand him as meaning that the manager is exempt from any liability to account on the occasion of a partition of the family estate between the members. In *Konerrav v. Gurrao*, I. L. R., 5 Bom., 589, MELVILL, J., lays it down as the ordinary rule that a Hindu co-parcener seeking a partition cannot demand [279] an account, but he is there speaking of a partition between members who have been in possession of different portions of the property, and he considered that there was nothing in the extent of the property in the possession of either of the parties to take the case out of the ordinary rule, and he remarks that where one member of the family has been entirely excluded from the enjoyment of the property, there might be good grounds for ordering an account. Mr. Justice MELVILL is not considering the case of a member who has had the exclusive management of the family property in his hands, and we think it would be difficult to hold that there is anything in the custom of a Hindu family which can justify the manager in refusing to render any account whatever of his management on the occasion of a partition and requiring the other members to accept his *ipse dixit* as to the property subject to partition. What that account should be, so as to discharge him from his liability to account as manager, and what objections the other members can take to it must, we apprehend, depend on the conduct of the manager and the other members, the nature of the property and the circumstances of the family, and cannot be satisfactorily stated in definite terms. However, it has never been said that members who were minors during the management cannot ask for an account, and as they cannot be taken to have consented to the management, they are entitled, when they attain their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interests. The presumption, however, being as WEST, J., points out, that in the absence of evidence the property for partition is such as it exists at the time of the suit for partition. In the present case, as the plaintiff of his own accord applied for and obtained a certificate of administration of the appellants' estate under the Minors Act, there is all the more reason for holding him accountable for acts of mismanagement and extravagance, if proved against him.

It was said, however, that the defendants have been guilty of laches in not sooner impeaching the plaintiff's management, and should not be allowed to do so now; but the second and third defendants were, by virtue of section 3 of the Indian Majority Act (IX of 1875), not of age until they attained twenty-one, which would not [280] have been, as Mr. Vasudev admitted, more than a year and three years respectively before the present suit for partition was brought by the plaintiff, with whom they had lived and been on good terms up to that time. We must, therefore, in answer to the 22nd issue raised by the Subordinate Judge, hold in the affirmative that it is open to the defendants to raise objections with reference to the plaintiff's management.

As to the nature of the account which plaintiff should render of past transactions, we agree with the Subordinate Judge that, having regard to the circumstances of this family and the nature of the family property, the plaintiff in producing the books of the firm since Maneklal's death, which contain an account of all transactions relative to the firm's property and as well of the business as the moveable property and also the immoveable property with provisional rent, has done all that he could be expected to do whether as the family manager or as certificated administrator of the defendant's interests in

the family property. The defendants indeed complain that no books are forthcoming before Maneklal's death, and suggest that they have been kept back, but this objection, it is to be remarked, was not taken when the plaintiff produced his books at the trial, nor after the defendants had had an opportunity of examining them, and is now taken on appeal for the first time. The plaintiff was not examined in the Court below, but the *gumasta* of the firm, (witness No. 460), says that the books were burnt in the fire which admittedly took place in Bulsar. The same account was also given in the *fargati* suit as appears from the defendant Damodar's deposition in this case, and should, we think, be accepted in default of any rebutting evidence. The sale of some old books, stated in entries (exhibits 402 and 410) to have taken place in 1874 and 1882, might have been explained if the *gumasta* had been asked about it.

It is not in dispute that the plaintiff Uttamram and Chhaganlal carried on separate money transactions, and Damodar's affidavit and the notice to produce books show that Damodar considered that they had been doing so before Maneklal's death. The plaintiff's own case is that his separate business was carried on by means of his own and his wife's money. [281] He made a statement to that effect in the *farkhat* Suit No. 2251 of 1872, naming at the same time the persons with whom he had those transactions, and repeated it in answer to defendants' interrogatories in this case. The Subordinate Judge in the *farkhat* suit found that the plaintiff Damodar had failed to prove that the private transactions of Uttamram and Chhaganlal had been carried on with the moneys of the family. This is important, as Damodar had been quarrelling with Uttamram for several years before the partition in 1869, and although only eighteen or nineteen at that time, must have been in a position to ascertain the truth. It is not contended that the firm's books, in which Uttamram and Chhaganlal had separate *khulas*, afford any support to the defendants' case. The defendants' suggestion would appear to be that moneys were taken by Uttamram and Chhaganlal when Maneklal was suffering from paralysis two or three years before his death or after his death, but it rests upon no evidence whatever to support it.

Upon the whole, we agree with the Subordinate Judge that, having regard to the long period (commencing probably even before Maneklal's death) during which these separate transactions have been openly going on side by side with the firm's transactions, it was incumbent on the defendants to give some evidence that the family funds were used in them, as they allege, and none is forthcoming. The Subordinate Judge has, therefore, in our opinion, decided the issue raised by the 10th item of the 19th paragraph of the written statement and the 12th issue correctly in holding, that the cash balances and outstandings relating to the dealings carried on by the plaintiff in his and his brother Chhaganlal's names are not liable to be included in the partition. There is, however, a sum of Rs. 2,500 debited to the defendant Damodar in the firm's books for 1924, which the judgment in the *farkhat* suit held not to have been paid to Damodar. The plaintiff must, therefore, account for that sum, but without interest.

Passing to the consideration of the specific charges of mismanagement set out in the 19th paragraph of the defendants' written statement, we think that the Subordinate Judge has correctly disposed of the first three. The circumstance that the plaintiff [282] had obtained a certificate of administration of the interests of the minors and sold their interests in the houses without the consent of the Court, could not, in any view of the Minors Act and quite independently of the remarks of the Court in *Sargi v. Dattu*, 12 Bom. H. C. Rep., 281, give the defendants any counter claim against the plaintiff in this suit without proving that they had been prejudiced by the sale. Here Chhaganlal and Dayabhai may be

presumed to have consented to the sales of the houses and shops, and there is no evidence to show that they were not sold with a due regard to the interests of all the members of the family. The same remark applies to the purchases of the houses between *Samvat* 1920 and *Samvat* 1940 for Rs. 5,088 and the plot of ground purchased in *Samvat* 1922 for Rs. 16,200 and afterwards built on.

The 4th item relates to the purchase of ornaments. It was suggested that there were family ornaments in existence at the time of Maneklal's death, and it was urged that this might be inferred from what plaintiff admitted in the *fargati* suit, *viz.*, that he, Dayabhai and Chhaganlal had about Rs. 2,000 each of ornaments at the time of Damodar's separation, and the entries of ornaments made since Maneklal's death. This, however, would only show that the sons by the first wife had had ornaments given to them for their own use during their father's life, and presumably by him, in the absence of evidence to show the contrary, such gifts, if not of an unreasonable amount, might be validly made by the father even out of ancestral moveable property—*Mitakshara*, Ch. I, s. 1, para. 27. The decision of *Lakshman v. Ramchandra*, I. L. R., 1 Bom., 561, referred to by the defendants, does not militate against this view. The family was a wealthy one, and the father might well have given his eldest son, the plaintiff, and his wives ornaments of the value of Rs. 1,300, even assuming that the gift of ornaments of such an amount can be fairly inferred from the evidence, which, however, is far from being the case. However, as to ornaments purchased since the death of Maneklal, we think that they must be brought into hotchpot by all the parties in making the partition of the family property. It was said indeed [283] for the defendants that there was no sufficient proof that they had received the ornaments stated in the accounts to have been purchased for them. The *gumasta* said they had been given to their mother. Kasbi, however, was not called by either party, and there would be no presumption, as the Subordinate Judge thinks, that the minors received them. On the whole, we think it would be more satisfactory that the question whether the defendants or any or either of them have or has received the ornaments so stated in the accounts to have been received by them or him should be distinctly considered by the Court in executing the decree as regards bringing the ornaments into hotchpot. The plaintiff should also bring into hotchpot the ornaments or their value mentioned in Exhibit I N as being of the value of 83 rupees, 35 rupees and 11 rupees respectively, but not stated to have been made for any member of the family in particular, and of which the plaintiff is unable to give any satisfactory account.

As to the remissions of tenants and compromises of suits, although they show a loss to the family firm of a considerable sum between 1920 and 1942, the defendants have failed to give any proof that they were improper or uncalled for. The circumstance that Damodar was not made a party to the suits, may have afforded the defendants an opportunity of taking a technical objection, but cannot by itself and without any other evidence afford sufficient reason for concluding that they were compromised without adequate cause, or contrary to the interests of the family. As to the remissions to debtors, the Court below has considered they were satisfactorily explained by plaintiff, and that to Rajaram Ganda was, we think, the only one seriously disputed before us. Rajaram owed Rs. 1,024 to the firm, which was compromised at Rs. 551. The defendants say that Rs. 150 was advanced to Rajaram on the same day and is included in the Rs. 551, and that Rajaram's debt to plaintiff was compromised at Rs. 150 with the Rs. 150 purporting to be advanced to Rajaram. The plaintiff by his *vakil* says that Rajaram paid no money, but gave a transfer on Pestonji Bomanji and paid the plaintiff his debt when compromised in the

same way—and the *samadaskat* of 1925 was referred to to establish this. Mr. Shivram could not deny that [284] it so appeared by the *samadaskat*, and upon this evidence, which the defendants have not been able to rebut in any way, we think the explanation must be accepted. As to clause 14, which relates to the items of Rs. 375, Rs. 740 and Rs. 1,000 (mentioned in T 2) debited to Chhaganlal, the first sum was, as the books show, taken by Chhaganlal himself and afterwards debited to his daughter Harkor's marriage deposit account. The Rs. 740 were written off for expenses incurred by Chhaganlal on his visit to Bombay, and the Rs. 1,000 were given by him to a widowed daughter on his deathbed. The entries must, we think, in the state of the evidence, be presumed to be correct. Chhaganlal himself, as the evidence shows, took part with plaintiff in the affairs of the family and wrote in the books. In any case, there is no evidence to make plaintiff personally liable for them, or to forbid their being transferred to the general account.

As to the losses sustained in trade amounting to Rs. 8,935-1-3 mentioned in statement T 5, the defendants say that such trade was not part of the firm's legitimate business, and that plaintiff should be held liable for them. The ledger, however, of 1920 shows that business in molasses, grain, &c., was carried on in Maneklal's lifetime, and the conclusion is, therefore, that it was part of the firm's business. As to the transactions themselves, plaintiff's *vakil* says that no contract books were kept, and that the particulars of the business are to be found either in the firm's books or those of the parties with whom they traded, and the plaintiff was not questioned about them in the interrogatories. No case has, therefore, been made out for holding plaintiff personally liable for the losses, and they were properly debited to the general business account of the firm.

As to the expenses of litigation, to which items 17 and 18 of clause 19 of the written statement taken in connexion with the defendants' statements relate, we cannot agree with the Subordinate Judge that the expenses incurred by plaintiff in the *targati* suit should be made a charge on the estate. The plaintiff and Chhaganlal were declared by the judgment of the High Court to have taken advantage of Damodar's youth, and to have given him less than his fair share of the family property, [285] and the *farkhat* executed by Damodar was set aside. No part, therefore, of the expenses incurred by the plaintiff, whether directly or by paying Damodar's costs (if any), can be properly thrown on the estate to the prejudice of the defendants. As to expenses incurred by plaintiff in the suits against debtors and tenants, it was urged that such as were caused by plaintiff's not making Damodar a party to the suits should not be charged on the estate. It was urged for plaintiff that he might have thought in good faith that as manager he could sue in his own name, and that it was not necessary to make Damodar a party, but this could not be so after Damodar objected to being represented by him. We think, therefore, that the expenses caused as above stated must also be excluded from the expenses of litigation to be charged on the family estate.

With regard to the expenses incurred by the plaintiff in the proceedings which Damodar instituted to set aside the certificate and for an account, as that litigation was exclusively between plaintiff and Damodar, in which the other defendants were in no way concerned, they ought not to be charged on the estate. The same remark applies to the Rs. 3,994-8-0 referred to in sub-clause 18 of clause 19 of the written statement, being the expenses incurred by Damodar in the *farghati* suit exclusive of what Damodar has recovered as costs from plaintiff, as the other defendants are in no way responsible for the plaintiff's misconduct in the partition which was set aside. As to item 13 of clause 19 of the written

statement, the plaintiff admits he must account in partition for the Rs. 15,000 drawn out by him on 1st October 1885, a few months before the institution of the suit, and also for the Rs. 5,048 drawn out on the 13th January 1886. In making up the partition account, Damodar must bring in the houses which he received in 1869 when he separated from the family, and also account for the rents received by him for the same, excepting the house in which he lived. Damodar, on the other hand, must be credited with the several annual sums, mentioned in the statement I Z on account of maintenance and such sums as he may have expended in repairs or rebuilding of the houses or any of them, in taking account as shown in I Z to which he was entitled after he was restored to family.

[286] It remains to consider the objections taken to the maintenance awarded to Manchha, widow of Chhaganlal, Krishna *alias* Kashi, widow of Maneklal and mother of the first three defendants, and Nandkore, widow of Maneklal's brother Pranjivandas. It has not been seriously contested before us that maintenance is forbidden by the custom of the caste, as stated in the written statement of Damodar. The lower Court awarded Rs. 100 per annum and a residence to the three widows. The first three appellants object to maintenance being awarded to Manchha and Nandkore, because they say Manchha is provided for by Chhaganlal's separate business, which is managed by plaintiff, and Nandkore did not ask for any. This was not the objection as reported by Manchha taken in the Court below, and there is no evidence to support it. It was there only said that she should bring in the joint family property she possessed, but the lower Court found, and no attempt has been made to dispute the correctness of the Court's finding, that she had no property of any sort except perhaps a few hundred rupees and ornaments which are unproductive property. As to Nandkore, she was made a party, and it was admitted by Damodar, and this is not disputed by the other defendants, that she was entitled to maintenance if the other widows were. No reason has been shown for interference with the award of the Court as regards their maintenance, which is almost nominal in amount.

As regards Krishna *alias* Kashi, the mother of the first three defendants, she contends that she is entitled to a one-fifth share of the family property, and not merely to maintenance. This objection raises a question which has never been the subject of express judicial decision in this Presidency, although it is referred to by Mr. Justice WEST in his elaborate judgment in *Lakshman v. Satyabhamabar*, I. L. R., 2 Bom., 494, at p. 504. However, in *Damoodur Misser v. Senabuttu Misrao*, I. L. R., 8 Cal., 537, at p. 539, it was decided in a partition suit (Mr. Justice MITTER delivering the judgment of the Court), where a deceased father had left sons by different wives, that each wife, that is, both mother and step-mother, according to the leading authorities of the Mitakshara school, shared equally with all the [287] sons. The conclusion is based, in the main, on the Mitakshara, Ch. 1., s. 7, v. 1, where it is said that "heirs dividing after the death of the father let the mother also take an equal share." This leaves it in doubt whether the term "mother" includes step-mother, but the Court adopted the opinion of the author of the Viramitrodaya at page 80 that it was intended by the author of the Mitakshara to include it from the circumstance that the passage is introduced by the remarks "It has been ordained that the wives are entitled to share equally with the sons in partition during the lifetime of the father," which shows that the division is the same whether the partition is effected before or after the death of the father. This view is also confirmed by the language of the Mayukha, Ch. IV, s. 4, vs. 18 and 19.

It was urged indeed by Mr. Vasudev for the respondent that Kashi should only share equally with her own sons, but that would be clearly contrary to the

rule laid down in the Mitakshara on a division during the father's lifetime. It was said, however, that the right of a mother to share with the sons on partition was obsolete. Mr. Mayne says it is so in Southern India, but there is no sufficient reason for thinking that it is so here. It may be that no instance of its being recognized is to be found in the reports; but this is scarcely a matter for surprise, as, when partition takes place between brothers, the widows still living are generally only the widows of deceased brothers. However, the questions and answers in West and Bühler, pages 360, 820, 824, conclusively show that the mother is still considered to be entitled to a share in this Presidency, and not to a mere setting apart of a maintenance. They, as well as the remarks of the learned authors, are inconsistent with the opinion which is expressed by Rao Sahib Mandlik in his work that the claim of a mother to a share is obsolete.

On the whole, we think that no case has been made out for treating the mother's claim as obsolete. The conclusion arrived at by the Calcutta High Court on the question as to the right of a step-mother to share equally with all the sons, although not entirely free from doubt on the several Hindu texts and authorities, appears to us to be in accordance with the opinion of the author [288] of the Mitakshara, the principal authority in this Presidency, and should be adopted. Krishna will, therefore, be entitled to a one-fifth share in the estate, but subject to the liability to contribute with the other co-sharers towards the maintenance of Manchha and Nandkore: as we cannot hold that she has waived her right to share in the family estate because she did not claim it when Dayabhai separated from the family in 1868, or Damodar asked for his share in 1869. There is no evidence to show that she took any part in those transactions, which were apparently managed exclusively by the plaintiff, the eldest son, with the tacit consent of Chhaganlal.

It remains to consider the question as to the custody of the *rajseva*. We think that question has been rightly decided by the Subordinate Judge. We think that the findings on issue 8 should be varied by declaring that the plaintiff Uttamram is entitled to take the *rajseva* and keep it, with the property appertaining thereto, as the family idol and the property thereof, which, we agree with the Subordinate Judge, is rightly stated in the inventory attached to the plaint, with liberty to such members of the family as are or shall become *marjadas* to have access to the same for the purposes of worshipping them.

This disposes of all the questions raised by the appeal, except as to the costs of the suit, which the Court below has thrown on the estate. As the Court below has found, and we think correctly, that the defendants have failed in establishing any fraudulent or dishonest conduct on the part of the plaintiff in the management of the estate, the rule in ordinary partition suits, that the costs of the suit should be borne by the estate, was properly followed. The decree must, therefore, be varied in accordance with the remarks made in this judgment and also as to the costs of Bai Krishna, Bai Manchha and Bai Nandkore, each of which must be calculated on the claims as allowed by this judgment, but subject thereto the decree is confirmed, and we think that parties should pay their own costs of this appeal, except costs of Bai Krishna, which should be paid by the plaintiff.

Decree varied.

NOTES.

[As regards accounts on partition, see also (1894) 19 Bom., 532; (1895) 20 Bom., 659. As regards the partition of a religious office, see also (1914) 20 C. L. J., 183 at 193. As regards the validity of gifts of reasonable amounts, see also (1904) 29 Bom., 51.]

[289] APPELLATE CIVIL.

The 10th March, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE TELANG.

Kalian Moti.....(Original Plaintiff) Appellant

• versus

Pathubhai Faljibhai.....(Original Defendant) Respondent.

*Talukdars Act (Bombay Act VI of 1888), Sec. 31, Cl. 2—Construction—
Retrospective operation—Alienation of estate—Sanction.*

A decree upon a mortgage-bond passed against part of a *talukdar's* estate on the 15th August 1887, was transferred under section 320 of the Civil Procedure Code (Act XIV of 1882) to the Collector for execution. The property was sold on the 5th August 1889, but the Collector refused to confirm the sale, as the sanction of the Governor in Council under clause 2, section 31 of the *Talukdars' Act* (Bombay Act VI of 1888), which came into force on the 25th March 1889, had not been obtained.

Held, that the section was not retrospective in its operation, and that the sale should be confirmed, although no sanction had been obtained. When the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the presumption was that the Legislature did not intend to interfere with that vested right. That presumption was not rebutted by any intention to interfere appearing in the Act itself.

THIS was a second appeal from an order passed by E. M. H. Fulton, District Judge of Ahmedabad, in execution of a decree.

The plaintiff, Kalian Moti, obtained a decree on the 5th August 1887, in the Court of the Subordinate Judge of Dhandhuka on a *san* mortgage relating to certain land which formed part of a *talukdar's* estate. The decree directed that the amount due upon the mortgage should be recovered by the sale of the land, and it was, therefore, transferred to the Collector for execution under section 320 of the Civil Procedure Code (Act XIV of 1882). The property was sold on the 5th August 1889, but the Collector refused to confirm it, as it was not sanctioned by the Governor in Council under clause 2, section 31 of Bombay Act VI of 1888† which came into force on the 25th March 1889. He sent back the papers to the Court, stating that no sale could be [290] made. Subsequently the plaintiff, who himself was the purchaser at the auction sale, presented an application that the Collector should be ordered to give a certificate of sale. The Subordinate Judge held that the order of the Collector was right, and rejected the application.

The plaintiff appealed to the District Court, which confirmed the order of the Court below.

After referring to clause 2, section 31 of Bombay Act VI of 1888 the District Judge made the following observations in his judgment:—

"The Act came into force on the 25th March 1889. By section 2 the word alienation is defined as meaning 'transfer of ownership.' Section 316 of

• Second Appeal, No. 586 of 1891.

• † Clause 2, section 31 of Bombay Act VI of 1888.—No alienation of a *talukdar's* estate, or of any portion thereof, or of any share or interest therein made after this Act comes into force shall be valid unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the *jama* and of the village expenses and police charges due in respect of the alienated area shall thenceforward vest in the alienee and not in the *talukdar*.

the Civil Procedure Code provides that after a sale of immoveable property has become absolute (by confirmation) a certificate shall be granted to the purchaser, and declares that such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before.

"It follows, then, from the wording of these two sections combined with that of clause 2 of section 31, Bombay Act VI of 1888, that no sale of a *talukdari* estate has any validity unless it was confirmed prior to the 25th March 1889, or has been sanctioned by the Governor in Council.

"But it is urged that the Gujarat Talukdars Act, 1888, cannot be given retrospective effect so as to affect the rights of the plaintiff in respect of his prior mortgage and decree. There is, no doubt, a general presumption against the intention of the Legislature to interfere with vested rights, unless such intention is unmistakably expressed, and the effect of section 6 of Act I of 1868 has to be considered. By this section it is enacted as follows:— 'The repeal of any Statute, Act or Regulation shall not affect anything done * * * or any proceeding commenced before the repealing Act shall have come into operation.' Now it appears to me that this provision does not apply to the present case, because though the result of the Gujarat Talukdars [291] Act is to supersede, in certain cases, section 312 of the Civil Procedure Code, which directs the Court to pass an order confirming the sale when no objection to it has been established, still it does repeal it. The section seems applicable only to cases where a law has been expressly repealed. If, then, such be the case, it is manifest that the objection to the sale founded on section 31 of Bombay Act VI of 1888 must prevail, unless on general principles it can be held that it was not the intention of the Legislature to affect previously formed contracts or pending proceedings.

The plaintiff appealed to the High Court.

Nagindas Tulsidas Marphatia for the Appellant:—Both the lower Courts were wrong in refusing to order the Collector to give us a certificate of sale. Clause 2, section 31 of the Talukdars Act (Bombay Act VI of 1888) applies to a private sale effected by a *talukdar* himself, and not to a judicial sale. It could not have been the intention of the Legislature to make a decree, which gives a vested right to parties beneficially affected by it, inoperative by giving retrospective effect to a subsequent enactment. The decree under which we seek to recover our money, having been passed before the Act came into force and having directed a sale of mortgaged property, must end in execution; otherwise it would be merely a dead letter. To hold that the decrees passed prior to the passing of the Talukdars Act, but not executed, cannot afford relief to the decree-holders would be to deprive money-lenders of their money without having any source open to them for its recovery. In such a case the creditor cannot fall back upon the mortgage, because it has become merged in the decree, and he cannot take advantage of the decree, because owing to the absence of the Government's sanction the Act would not allow it to be executed. It cannot be said that the Legislature intended to pass an Act which, according to the construction put upon it by the lower Courts, sets aside a mortgage effected before the Act came into force.

There was no appearance for the Respondent.

Sargent, C. J.:—In this case the appellant had obtained a decree on 5th August 1887, on a mortgage bond on the lands in [292] question, part of a *talukdar's* estate, and which decree had been transferred, under section 320 of the Code of Civil Procedure, to the Collector for execution. The sale of

the property took place on 5th August, 1889, but the Collector refused to confirm it, as there was no sanction of the Governor in Council to it. Both the Courts below have held the Collector's refusal well founded.

By clause 2, section 31 of the Bombay Act VI of 1888, "no alienation of talukdar's estate or of any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the *jama* and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the talukdar." We agree with the lower appeal Court that section 6, Act I of 1868, does not apply to the present case. In any view of that Act, here the proceeding in execution of the decree had not commenced before the Talukdars Act. We also agree with the lower appeal Court that the sale by the Court followed by confirmation of such sale and grant of certificate, effecting, as they do, the transfer of ownership to the auction-purchaser, is an alienation within the definition of that term; but when the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the important question for decision is whether the presumption against the Legislature having intended to interfere with that vested right is rebutted by a clear intention to do so appearing on the face of the Act itself.

The District Judge held that the words of the section were plain as having a retrospective effect. No doubt, the language of the section is distinct in prohibiting alienations after the passing of the Act, but none the less clear was the language of the Mercantile Law Amending Act, by section 9 of which the effect of all writs of *fiери facias* as against the goods of a debtor to the prejudice of *bond fide* purchaser for value was taken away, but which in *Williams v. Smith*, 4 H. and N., 559, was held not to apply to a [293] *fiери facias* taken out before the Act. The object of the Act, as stated in the preamble, is to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code to talukdars' estates and to make provision for the revenue administration of the same; and if the sanction of Government had been required by the Act only to insure that object, it might be said that the necessity for the sanction would equally arise where the alienation was in execution of a decree; but the language of the Legislature clearly leaves it absolutely in the hands of Government to refuse such sanction, and thus to prevent the alienation being carried out without assigning any reason whatever; and we think that, without clearer proof than is afforded by the language of the Act, we ought not to conclude that it was intended to be exercised when a decree of the Civil Court had already before the Act directed that the property should be sold. The case of *Pryor v. Pryor*, L. R., 10 Ch., 469, is important as showing how unwilling the Court is to construe an Act in such a manner as to take away an existing right under an unexecuted decree. In that case the Act only affected the particular course of procedure after decree in a partition suit, yet the Court refused to give it a retrospective effect.

We must, therefore, reverse the order of the Court below, and direct the Court to give the necessary instructions to the Collector in accordance with the above remarks.

Order reversed.

NOTES.

[This was followed in (1899) 1 Bom. L. R., 849; see also (1894) 19 Bom., 80; (1897) 22 N., 884; (1899) 1 Bom. L. R., 154; (1909) 11 Bom. L. R., 1372.]

[17 Bom. 293]

APPELLATE CIVIL.

The 7th April, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

The Secretary of State for India in Council.....(Original
Defendant) Appellant

versus

Jethabhai Kalidas.....(Original Plaintiff) Respondent.*

*Declaratory decree—Declaration of title to land—“Specific Relief Act (I of 1877),
Sec. 42—Criminal Procedure Code (X of 1882), Sec. 133—Order for removal
of an obstruction standing upon certain land—Ownership of such
land—Effect of Magistrate’s order under Section 133—
Jurisdiction of Civil Court after order made.*

The Magistrate made an order against the plaintiff, under section 133 of the [1882] Criminal Procedure Code (Act X of 1882), for the removal of a certain *otta* standing in front of the plaintiff’s shop as an obstruction to the public way. The plaintiff, thereupon, brought this suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood was his property and not that of the Government.

Held, that the public roads being vested by section 37 of the Land Revenue Code (Bombay Act V of 1879) in the Government of Bombay, they were “interested to deny” the plaintiff’s title to the land, and, therefore, under section 42 of the Specific Relief Act (I of 1877), the plaintiff (subject to the discretion of the Court) was entitled to a declaration as against the Government of his right to the land, and the plaintiff was not called upon to wait until the Government had taken possession of the land.

It was contended that the jurisdiction of the Court to make the declaration prayed for was taken away by the last clause of section 133, which provides that “no order made by a Magistrate under this section shall be called in question in any civil Court.”

Held that the Magistrate’s order under this section is not a conclusive determination of the question of title.

THIS was a second appeal from the decision of E. M. H. Fulton, District Judge of Ahmedabad.

Suit for a declaration of ownership. The plaintiff sued for a declaration that certain land on which his *otta* stood was his property, and not that of the Government. He alleged that this *otta* had stood in front of his shop for sixty years; that a notice had been issued to him under section 133 † of the Criminal Procedure Code (Act X of 1882); that, in reply to the notice, he had stated that the land underneath the *otta* was his own, and that notwithstanding the said reply he had been ordered by the Magistrate to remove the *otta*.

The defendant pleaded that the suit was not maintainable, as section 133 provided that no order duly made under it by a Magistrate shall be called in question in a civil Court, and that the land was not the property of the plaintiff.

The Assistant Judge of Ahmedabad (Dayaram Gidumal) found that the suit was not barred under section 133 of the Criminal Procedure Code, but dismissed it on the ground that the land was not the property of the plaintiff.

*Second Appeal, No. 806 of 1890.

† Section 133 empowers a Magistrate to require the removal of an obstruction from any public place.

[296] The Assistant Judge made the following remarks in his judgment :—

"Section 133 of the Criminal Procedure Code says: 'No order duly made by a Magistrate under this section shall be called in question in any civil Court.' The order which can be made under this section is merely a conditional order, which after a certain procedure can be made absolute under section 137, Criminal Procedure Code. The plaintiff complained of the absolute order, but his amended plaint raises merely a question of title between the plaintiff and Government without impugning the legality of the magisterial order. The Calcutta High Court has recently discussed the question in all its bearings in a Full Bench judgment (*Chuni Lall v. Ram Kishen*, I. L. R., 15 Cal., 460, at pp. 467 and 470), and reviewed all the authorities. That judgment says: 'In the Bombay Presidency no difficulty arises, because by section 37 of the Bombay Act V of 1879 the soil of the public roads is vested in the Secretary of State. Accordingly every question of highway becomes of necessity a question of conflicting titles to the soil, and can be treated as such.' And, again, 'in this Court WHITE and FIELD, JJ., in *Mutty Ram Sahoo v. Mohi Lall Roy*, I. L. R., 6 Cal., 291, held that the Magistrate's decision did not preclude a civil Court from enquiring into the question of title. And in the Bombay High Court this view has been repeatedly accepted both under the earlier and the present Acts. It was taken by MELVILLE and KEMBALL, JJ., in *Lalji Unkeda v. Jowba Dowba*, 8 Bom. H.C. Rep., (A.C.J.), 94; by WESTROPP, C. J., and F. MELVILLE, J., in *Nilkantthappa Malkapa v. Magistrate of Sholapur*, I. L. R., 6 Bom., 670; and by MELVILLE and WIST, JJ., in *Balaram Chatrukhal v. Magistrate of Taluka Igatpur*, I. L. R., 6 Bom., 672.' The suit is, therefore, clearly maintainable."

The plaintiff appealed, and the District Court reversed the decree and allowed the plaintiff's claim, holding that plaintiff was proved to be the owner of the ground in dispute.

In his judgment the District Judge observed: "It is not [296] disputed that at the time when the Magistrate issued his order for the removal of the *otta* as an obstruction to the public way, the ground on which it stood was in possession of the plaintiff. The burden, therefore, of showing that he was not the owner, rested, under section 110 of the Indian Evidence Act, on the defendant, unless the effect of the magisterial order was such as to shift it on to the plaintiff. The learned Assistant Judge appears to have considered that it had that effect, but I am unable to agree with him. He argued, I think, very correctly that the words in section 133 of the Criminal Procedure Code, 'No order duly made by a Magistrate under this section shall be called in question in any civil Court,' were no bar to this suit, in which it is not sought to set aside the Magistrate's order, but to obtain a declaration of title against the Secretary of State. It might, no doubt, have been argued that the plaintiff, which merely alleges that the plaintiff had received notice from a Magistrate to remove his *otta*, revealed no cause of action against the Secretary of State, who was in no way responsible for the Magistrate's orders. Possibly the suit might have been successfully resisted on the ground that it was premature, and that until the *otta* had actually been removed and the ground thrown into the road—or, in other words, until the Secretary of State had obtained possession under section 37 of the Land Revenue Code,—there could not be any cause of action against him, as Government in its executive capacity had no control over the magisterial order, and, therefore, could not be liable to any suit until he had taken possession of the land from which the Magistrate had directed the plaintiff to remove his *otta*. But this defence was not raised. * * The defence as put forward was understood to mean that under section 133 the Magistrate's order was

conclusive as to title, and would continue so after it had been carried out, and the ground has fallen into the possession of the defendant.

"Assuming, then, that the defendant accepted the Magistrate's order as giving Government a right to possession, and did not question the existence of a cause of action otherwise than on the contention that the order of the Magistrate conclusively established his title to the ground, I think the Assistant [297] Judge was right in holding that the suit could be maintained. The decisions which he has quoted show clearly the opinions of the High Courts of Bombay and Calcutta on the subject, and satisfy me that section 133 is not a final determination as between the person complaining of the interference with his enjoyment of ground in his possession and the Secretary of State on the question of title. It, therefore, remains to consider what effect it has in determining this question. Probably the existence of the order is relevant under section 42 of the Evidence Act, but it is not in itself, I think, sufficient to shift the burden of proof from the defendant to the plaintiff, who was admittedly in possession."

The defendant appealed to the High Court.

Rao Sahab Vasudeo Jagannath Kirlikar (Government Pleader) for the Appellant:—Section 133 of the Criminal Procedure Code (Act X of 1882) expressly debars a civil Court from calling in question the propriety of an order made by a Magistrate under that section. Although the present suit is brought ostensibly for the declaration of the respondent's title to the ground underneath the *otta*, still the real object of it is to reverse the Magistrate's order. The respondent is indirectly attempting to do what the law forbids him to do directly. Even if this Court makes the declaration asked for, the Magistrate's order for the removal of the *otta* stands untouched. This Court cannot interfere with that order, or the Magistrate may pass a fresh order under the section after the declaration. In such a case the decree of a civil Court would give no relief.

[SARGENT, C. J.:—A party may after getting a declaratory decree go to the Magistrate and pray for a cancellation of his order, because the section proceeds on the assumption that the ground forms part of a public road.]

We submit that a Magistrate has no power to cancel his own order. There was no clause in the former Criminal Procedure Code similar to the clause in section 133; nevertheless the rulings in *Buroda Pershad Moostafee v. Gora Chand Moostafee*, 12 W. R., 160 Civ. Rul., and [298] *Meechoo Ohunder v. J. H. Ravenshaw*, 19 W. R., 345 Civ. Rul., show that the jurisdiction of civil Courts in such matters was barred: *a fortiori* it is barred now when there is a specific clause to that effect in section 133. *Khodabuksh Mundul v. Monglai Mundul*, I. L. R., 14 Cal., 60, supports our contention. The rulings of the Bombay High Court referred to by the Assistant Judge were under the old Act, and the present question was not raised and discussed. The Full Bench decision in *Chuni Lall v. Ram Kisheh*, I. L. R., 15 Cal., 460, is against us, but it proceeds upon the assumption that the Bombay cases were decided under the present Code. We further submit that the respondent has no cause of action against the defendant. It is the order of the Magistrate that is prejudicial to him, and not any act of the Executive Government. In any event, his cause of action has not yet arisen, because the ground is not yet closed by the removal of his *otta*. The suit is, therefore, premature. The Lower Appellate Court wrongly placed the burden of proof upon us. The order of the Magistrate raises a presumption in our favour—*Navalchand v. Amichand*, P. J. for 1889, p. 259.

Chimanlal Hiralal Setalvad, for the Respondent, was not called upon.

Sargent, C. J. :—The plaintiff in this case seeks for a declaration that certain land on which he had erected an *otta* was his property and not that of Government. It appears that the Magistrate had made an order, under section 133 of the Criminal Procedure Code (Act X of 1882), for the removal of the *otta* as an obstruction to the public way. The public roads are vested by section 37 of Bombay Act V of 1879 in the Government of Bombay, who are thus "interested to deny" the plaintiff's title to the land and, therefore, under section 42 of the Specific Relief Act (I of 1877) the plaintiff (subject to the discretion of the Court) was entitled to a declaration as against the Government of his right to the land. Under the circumstances, it appears to us to be a proper case for a declaratory decree, as we cannot think that the plaintiff was called upon to wait until the Government had taken possession of the land. These objections, moreover, as [299] the District Judge remarks, were not expressly taken in the first Court.

It has, however, been throughout contended that the jurisdiction of the Court is taken away by section 133 of the Criminal Procedure Code, which provides that "no order duly made by a Magistrate under this section shall be called in question in any Civil Court." We entirely agree with the Lower Appeal Court that the decisions of this Court, as well as of the Calcutta High Court, are distinct authorities that the Magistrate's order is not a conclusive determination of the question of title—*Chuni Lall v. Ram Krishen*, I. L. R. 15 Cal., 460.

With respect to the *onus* of proof we agree with the District Judge that the existence of the Magistrate's order does not of itself shift the *onus* of proof from the defendant to the plaintiff who is in possession. It was for the Court itself to appreciate the whole of the evidence and to come to a conclusion whether it was such as to rebut the ordinary presumption of ownership derived from possession. The District Judge held that it did not rebut it, and was, therefore, right in making a declaration that the plaintiff was the owner of the land on which the *otta* stands. We must therefore, confirm the decree with costs.

Decree confirmed.

NOTES.

[See also (1896) 22 Bom., 230 ; (1904) P. L. R., 76.]

APPELLATE CIVIL.

The 20th June, 1892.

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Swamirao.....Applicant

versus

The Collector of Dharwar.....Opponent.*

Land Acquisition Act (X of 1870)—Assessor—Disqualifications in an assessor—Bias—Objections to assessor's appointment not raised in time—Waiver—Estoppel—Minor—Assessor not competent to act as witness.

Certain land belonging to the applicant, a minor, was taken by the Municipality of Hubli under the Land Acquisition Act (X of 1870). The Mamlatdar of Hubli; [300] who was an *ex-officio* member of the Municipal Committee, took part in the negotiations for the purchase of the land. He also gave evidence as to its value in the inquiry before the Collector. As the price offered by the Collector was not accepted by the applicant, the matter was referred to the District Judge, under section 15 of the Act, for the purpose of determining the amount of compensation.

On this reference the Mamlatdar acted as an assessor appointed by the Collector and was also examined as a witness as to the value of the land. But no objection was taken to his acting as an assessor. The District Judge eventually upheld the Collector's award. On an application under section 622 of the Civil Procedure Code (Act XIV of 1882),

Held that the award was bad. The Mamlatdar had, under the circumstances, a substantial interest in the matter, sufficient to disqualify him from acting as an assessor.

Kashinath v. The Collector of Poona, I. L. R., 8 Bom., 553, followed.

Held, also, that the minor applicant was not estopped from objecting to the competency of the Mamlatdar by the fact that his guardian had not raised any such objection in the Court below, and might, therefore, be taken to have waived it.

Assuming that there was a waiver, it could not bind the minor, as it was not for his benefit.

Held, also, that a person who is appointed an assessor under section 19 of the Land Acquisition Act (X of 1870) performs *quasi-judicial* functions and is, therefore, incompetent to testify as a witness in the same proceedings.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Certain land was taken up by the Municipality of Hubli under the Land Acquisition Act, X of 1870.

The applicant, a minor, was owner of the land in question. As he did not accept the compensation offered by the Collector, the matter was referred to the District Judge under section 15 of the Act.

The Collector appointed the Mamlatdar of Hubli as an assessor on his behalf. This Mamlatdar was an *ex-officio* member of the Municipal Committee, and had taken part in the negotiations for the purchase of the land in question. But no objection was taken before the District Judge to the Mamlatdar's acting as an assessor, or to his giving evidence as to the value of the land in question.

*Application, No. 40 of 1892.

[301] The District Judge, agreeing with the Mamlatdar, upheld the Collector's award.

Against this decision the present application was made to the High Court under its extraordinary jurisdiction.

A rule *nisi* was issued to the Collector of Dharwar to show cause why the District Judge's decision should not be set aside.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, showed cause :—The applicant did not take any objection in the lower Court to the Mamlatdar's appointment as an assessor. He must, therefore, be deemed to have waived the objection. The nomination of qualified assessors is a provision made by law for the benefit of the claimants to compensation. That benefit they may waive if they please. It is, therefore, too late for the applicant to contend that the Mamlatdar was not qualified to act as an assessor, and on that ground to upset the whole proceedings—*Park Gate Iron Co. v. Coates*, L. R., 5 C. P., 634 ; *Queen v. Meyer*, 1 Q. B. D., 173 ; *MacAllister v. The Bishop of Rochester*, 5 C. P. D., 194 ; *Ardesar Hormasji Wadia v. The Secretary of State for India in Council*, 9 Bom. H. C. Rep., 177 ; *Unniraman v. Chathan*, I. L. R., 9 Mad., 451 ; *Maxwell on the Interpretation of Statutes*, 474.

Manekshah Jahangirshah, contra :—The applicant is a minor ; his guardian had no authority to waive the objection to the Mamlatdar's competency. If there was any waiver, it cannot bind the minor, as it is clearly of no benefit to him—*Rhodes v. Swithenbank*, 22 Q. B. D., 577. The Mamlatdar had a real bias in the matter. He had, as a member of the municipality, taken part in the negotiations for the purchase of the land in dispute. He was examined as a witness for the municipality both before the Collector and before the Judge. He was, therefore, disqualified from acting as an assessor—*Loburn Domini v. The Assam Railway and Trading Co.*, I. L. R., 10 Cal., 915 ; *Kharak Chand Pal v. Tarack Chunder Gupta*, I. L. R., 10 Cal., 1030 ; *Kashinath v. The Collector of Poona*, I. L. R., 8 Bom., 553.

[302] *Jardine, J.* :—The applicant objects to the award of compensation made by the District Judge under the Land Acquisition Act, X of 1870, on the ground that the assessor nominated by the Collector, namely, the Mamlatdar of Hubli, with whose opinion the Judge concurred, had a substantial interest in the matter, sufficient to disqualify him according to the principle enforced by this Court in *Kashinath v. The Collector of Poona*, I. L. R., 8 Bom., 553. It appears that the Mamlatdar is a member of the Municipal Committee, which seeks to acquire the land, and that while holding that position he had acted for the Collector in the negotiations and had given evidence before the Collector as to the value. We are of opinion that these facts bring the present case under the above decision.

It is, however, urged for the opponent that, as the applicant took no objection in the Court below to the competency of the Mamlatdar, his conduct amounts to a waiver, and his acquiescence there estops him here. Whether a party acting for himself could have waived the objection to the Mamlatdar acting, as a party can waive the common law objection of interest in the Judge—*Sergeant v. Dule*, 2 Q. B. D. at p. 567,—we need not determine. Even if the applicant's acquiescence were tantamount to waiver, it was a matter beyond the ordinary conduct of the litigation ; and as in *Rhodes v. Swithenbank*, 22 Q. B. D., 577, where the next friend had waived the right of appeal, the question arises whether it was for the benefit of the minor whom the applicant represents. We cannot hold this to have been the case. In the case of *Kashinath v. The Collector of Poona* the assessor is treated as performing a quasi judicial function, as an "associate in judgment" ; and the learned Chief

Justice points out that the opinion of either assessor who carries the Judge along with him determines irrevocably the amount of compensation. The Court set aside the award on the ground that the Mamlatdar, one of the assessors, had a substantial interest which could scarcely have failed to create in him a real bias. This principle pervades the decisions from those collected in Viner's Abridgment, (Title, Judges A) to such recent cases as *Queen v. Meyer*, 1 Q. B. D., 173; and it conflicts with it to [303] suppose that a minor can be benefited in his cause by the presence of a judicial officer having such an interest as imports a bias against him.

It further appears that the Mamlatdar, during the progress of the case before the District Judge, testified as a witness to the value of the land. Having regard to the legal effect of an assessor's opinion, we think the views expressed in *Empress v. Donnelly*, 1 L. R., 2 Cal., 405, on the course to be adopted when a sole Judge has testified as a witness, ought to influence this Court in its disposal of the present case, if there were any doubt.

We must, therefore, set aside the award and direct that fresh proceedings be taken on the reference and a new award passed.

The opponent to pay the costs incurred here. Those incurred in the District Court to be dealt with by that Court when passing a new award.

Rule made absolute.

[17 Bom. 303]

APPELLATE CIVIL.

The 22nd June, 1892.

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Nagesh.....(Original Defendant 1) Appellant

versus

Gururao.....(Original Plaintiff) Respondent.*

Hindu law—Inheritance—Succession—Succession among the remoter gotraj sapindas—Gotraj sapindas—Succession per capita—Practice—Second appeal—New point raised in second appeal.

Among the remoter *gotraj sapindas* the inheritance goes *per capita* and not *per stirpes*.

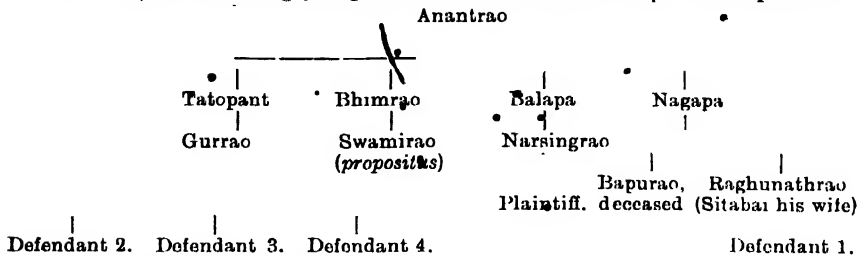
The High Court will allow, on second appeal, a new point to be raised for the first time, provided it is purely a question of law, arising on the findings of the Courts below, and not affected by any facts outside those findings.

SECOND APPEAL from the decision of T. Hart-Davies, Assistant Judge of Dharwar, in Appeal No. 72 of 1890 of the District File.

The plaintiff sued as one of the heirs of one Swamirao Bhimrao, deceased, to recover one-third share of certain property belonging to the deceased.

* Second Appeal, No. 232 of 1891.

[304] The following pedigree shows the relationship of the parties :—



Defendants pleaded (*inter alia*) that plaintiff was not the heir of the deceased Swamirao.

The Subordinate Judge held that defendant No. 1's mother, Sitabai, was the nearest *gotraj sapinda* of the deceased, and as such excluded the plaintiff. He, therefore, rejected the plaintiff's claim with costs.

On appeal, the Assistant Judge held that Sitabai, not being a childless widow, could not inherit in preference to her son, the defendant No. 1, and as all the parties stood in the same degree of relationship to the deceased, they took the property *per stirpes*. He, therefore, awarded to the plaintiff one-third share of the property in suit.

Against this decision the defendant No. 1 appealed to the High Court.

Balaji A. Bhagvat for Appellant :—All the parties stand in the same degree of propinquity to the *propositus*. They take *per capita*, not *per stirpes*. Nephews take *per capita* : see Mayne's Hindu law, section 526 : so, too, daughter's sons take *per capita*. I contend that by analogy sons of nephews take similarly. The principle is that those who take on their own right take *per capita* : see West and Bühler, 459, 445, and Mandlik's Translation of Vyavahar Mayuk, 81.

N. G. Chandavarkar for Respondent :—The point is not covered by any text or authority. Succession by *stirpes* is the common rule.

Telang, J. :—The point which is discussed by the Assistant Judge in this case, as to a female member of a family excluding her own son from inheriting to a distant relation, is now covered by authority, *Rachava v. Kalingapa*, I. L. R., 16 Bom., 716, and was properly abandoned by the pleader for the [305] appellant. He has, however, argued that the Assistant Judge was wrong in giving the plaintiff a third share of the estate, seeing that the plaintiff is one of six members of the family all equally distant in relationship from the *propositus* Swamirao. At the hearing, we intimated our opinion, that as the question was purely a question of law, which arose on the findings of the Court below, and could not be affected by any facts outside those findings, we ought to allow (cf. *Giriapa v. Ningapa*, ante, p. 100) the appellant to argue it although it was not raised in either of the Courts below. And we think that the question must be decided in favour of the appellant's contention. The Assistant Judge has held that the inheritance must go *per stirpes*, and that as the plaintiff represents one *stirpes* out of the three into which the family is now divided, he must get one-third of the estate. There is, however, no authority for this view. Succession *per stirpes* is laid down expressly in the case of a partition among the male descendants of a deceased person. But that is distinctly stated to be a special rule (see Stokes' H. L. Books, p. 391 ; cf. *Smriti Chandrika*, VIII, para. 5) based on a special text. The similar rule in relation to the distribution of *stridhan* is also based in the *Mitakshara* (see

Stokes' H. L. Books, p. 462) on a special text. It is not, therefore, a matter of course to apply that rule in a case to which no express text extends it. On the other hand, it is to be remarked, that the remoter heirs succeed in their own right, and directly to the *propositus*. According to the *Mitakshara*, no doubt, they succeed as belonging to the "line" of this or that ancestor of the *propositus*. But that is not material on the present point. In this case, for instance, it is true that the remoter heirs succeed as representing the line of Anantrao the grandfather of Swamirao, but all the members of the family shown in the genealogy belong in common to that same "line," and the sub-divisions of that line into the branches of Tatopant, Balapa and Nagappa are irrelevant on the present inquiry. Among them all, an heir nearer in degree would exclude a remoter one, and no regard would be paid to the fact of their respectively representing two co-ordinate *stirpes* of the family of the *propositus*. There is thus no positive [306] reason in favour of applying the rule of succession *per stirpes* to the case of the remote *gotraja sapindas*, while there are certain important considerations pointing the other way; and the rule itself is laid down as an exceptional rule in the cases in which the authorities show that it must be applied. It follows from this that it is not a rule which should be applied in the present case. And this conclusion derives some support from the analogies which were relied upon in argument. As regards daughter's sons, it has always been held that they succeed not *per stirpes*, but *per capita*, and this Court has recently so decided. (*Pandurang Gopa' v. Ram-chandra Damodar* and another decided on 27th January 1892). So in the case of brother's sons the same rule has been laid down. In both cases, the succession is direct, the nephews being entitled to claim as nephews, and being liable to be excluded by any uncle or aunt, as the case may be, if one happens to survive the *propositus*. The similarity between the succession of these nephews with that of the remoter *gotraja sapindas* is more complete than that between the succession of the latter and that of lineal descendants. And this is a consideration which supports the application of the rule of succession *per capita* in preference to that of succession *per stirpes*, to the case of the remoter *gotraja sapindas*.

We must, therefore, vary the decree of the Court below by substituting, in lieu of the third share awarded therein, a sixth share, which is admitted to be what the plaintiff is entitled to, according to the genealogy held proved by the Assistant Judge, and to the opinion above expressed. But as this point was made for the first time in this Court, the appellant cannot be allowed the costs of this appeal.

Decree varied.

NOTES.

[As regards when new points may be raised in appeal, see also (1893) 18 Bom., 679 (1902) 27 Bom., 452; (1904) 1 N. L. R., 1.]

[307] ORIGINAL CIVIL.

The 5th March, 1892.

PRESENT :

MR. JUSTICE PARSONS.

Dhondiba Krishnaji and others.....Plaintiffs

versus

The Municipal Commissioner of the City of Bombay.....Defendant.*

Negligence—Easement—Right of support of house by adjoining soil—Principal and agent or contractor—Liability of principal for acts of contractor—

Bombay Municipal Act (III of 1888), Sec. 527—Notice of suit—

What is sufficient notice.

The plaintiffs were owners of a house consisting of a ground floor and upper story and measuring 77 feet in length. On the south side of the house was a gully, 3 feet 6 inches wide, separating it from another upper-storied house. The plaintiffs in this suit complained that in January 1891 the defendant by his servants dug a trench, 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe, and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down. The plaintiffs claimed Rs. 3,996 as damages. The defendant denied the negligence, and alleged that the work was not done by his servants or agents, but by a contractor.

Held,* that the defendant was liable for the act of his contractor. The work was necessarily attended with risk, and the defendant could not free himself from liability by employing a contractor. The defendant, as well as the contractor, was liable to the plaintiffs.

For the defendant it was contended that the notice of action given by the plaintiffs under section 527 of the Bombay Municipal Act (III of 1888) was insufficient. The notice stated "that one S. L., a contractor under you,* and as such being your agent and servant, excavated a trench, &c." It was argued that this was not a good notice, as it only alleged a cause of action arising out of the acts of the defendant's servants and agents, and not out of the acts of a contractor.

Held, that the notice was sufficient. The section only required the notice to state with reasonable particularity the cause of action, and this was done. The individual by whom the damage was done was specified, and the acts which caused the damage were clearly set forth.

SUIT to recover Rs. 3,996-13-0 as damages for loss caused to the plaintiffs by the negligence of the defendant.

The plaint set forth that the plaintiffs were owners of a chawl situate in Haines Road in Bombay, consisting of a ground floor and upper story and measuring 77 feet in length and 19 feet and 6 inches in breadth; that on the south of this chawl was a gully, 3 feet 6 inches wide, separating the plaintiffs' chawl from another upper-storied chawl; that in January 1891, [308] the defendant by his servants excavated a trench, 8 feet deep, in the said gully for the purpose of laying a drain pipe; that the trench was made along the whole length of the plaintiffs' chawl at one time instead of being done in short lengths; that the sides of the trench were left unsupported, and that the whole work was done so negligently that the foundation of the south wall of the plaintiffs' chawl was undermined and slipped outwards, carrying the super-structure with it, so that the whole building became in a dangerous condition,

* Suit No. 241 of 1891.

and, in consequence thereof, the defendant, under the provision of the Municipal Act, caused the chawl to be pulled down, and the materials removed. The plaintiffs claimed Rs. 3,996-13-0 as damages.

The plaintiffs further alleged that prior to bringing the suit, viz., on the 27th January 1891, they had given the defendant the notice required by section 527 (see note*) of the Bombay Municipal Act (III of 1888). The notice was from the plaintiffs' solicitors (Messrs. Payne, Gilbert and Sayani) and stated (*inter alia*) as follows:—

"We are instructed that one Sitaram Luxmon, a contractor under you and as such being your agent and servant, during the last week excavated a trench 8' 0" [309] deep in the gully situate on the south of our clients' chawl for the purpose of laying down a drain pipe, with the result that the foundations of the south wall of the chawl were undermined and slipped outwards, carrying the superstructure with it, so that the south wall and other portions of the building were put into the dangerous condition attributed to it by the Municipality, and which necessitated the proceedings taken by them to remove the chawl.

"The shock caused by the slipping of the south wall has also broken the north exterior wall of the chawl, and this wall has an horizontal crack along its whole length at a height from 2 to 3 feet above ground level, and the masonry to this wall and to the said exterior walls which are also cracked will have to be rebuilt.

"Our clients charge that the damage to their said chawl was caused by the careless manner in which the excavation of the aforesaid trench was done. The sides of the trench were not shored or supported in any way, and the trench was opened the full length of the gully instead of in short lengths. The work, having regard to the depth of cutting, the narrowness of the gully and its close proximity to our clients' chawl, required the utmost care, yet the most ordinary precautions were neglected.

"Our clients estimate their damages at Rs. 4,000, and unless their claim is settled within one month from the date hereof they will take legal proceedings against you in the High Court to enforce it, which please note.

"Our client Dhondiba Krishnaji resides at the bazar opposite the Victoria Garden; Harriba Tukaram resides on the Parcel Road; and Raghuba Ramji resides at No. 107, Haines Road. They all live on their properties."

The suit was filed on the 1st May 1891.

The defendant filed a written statement. He denied the statements made by the plaintiffs as to the excavation of the trench, the negligence, &c., and stated that the excavation was made not by the defendant, his agents or servants as alleged in the plaint, but by a contractor. He also stated that, even if no

* Note.—Section 527 of Act III (Bombay) of 1888 is as follows:—

(1) No suit shall be instituted against the Corporation or against the Commissioner, or a Deputy Commissioner, or against any Municipal officer or servant, in respect of any act done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act:

(a) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief Municipal Office, and in the case of the Commissioner or of a Deputy Municipal Commissioner or of a Municipal Officer or servant, delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney or agent, if any, for the purpose of such suit: nor

(b) unless it is commenced within six months next after the accrual of the cause of action:

(c) the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice delivered or left by him aforesaid:

(2) At the trial of any such suit:

(d) the claim, if it be for damages, shall be dismissed if tender of sufficient amends shall have been made before the suit was instituted, or, if after the institution of the suit, a sufficient sum of money is paid into Court with costs.

excavation had been made, the plaintiffs would have been required to pull down the chawl as being in a dangerous condition, and that its said condition was not attributable to the excavation. The defendant also submitted that the notice of action given by the plaintiffs was not sufficient under section 527 of the Municipal Act, and that the plaintiffs were not, therefore, entitled to bring this suit.

Latham (Advocate-General) and **Jardine**, for Plaintiffs:—The fact that the defendant gave the work to a contractor does not [310] exonerate him from liability—*Hughes v. Percival*, 8 Ap. Ca., 443; *Bowen v. Peate*, 1 Q. B. D., 321; *Dalton v. Angus*, 6 Ap. Ca., 740, at pp. 790, 829, 831.

Russell and Scott, for Defendant:—They contended that the notice of suit of the 27th January 1891, was not sufficient under section 527 of Bom. Act III of 1888, and they cited *Ullman v. The Justices of the Peace for the town of Calcutta*, 8 Beng. L. R., 265; *Steel v. The South-Eastern Railway Company*, 16 C. B., 550.

Parsons, J.:—In dealing with this case it will be advisable to consider the points of law first, *viz.*, as to the sufficiency of notice and the liability of the defendant for the action of his contractor.

The material part of the notice before suit given to the defendant by the plaintiffs is as follows: (His Lordship read the notice of the 27th January above set out and continued:) It is contended that this alleges a cause of action arising out of the acts of the defendant's agents and servants only and not out of the acts of a contractor, and that, therefore, the plaintiff cannot recover if the contractor has been in default and the defendant guilty of a breach of duty. The law, however, (section 527 of the Bombay Municipal Act, III of 1888) only requires the notice to state with reasonable particularity the cause of action, and I am of opinion that this has been done when it is stated that "one Sitaram Laxmon, a contractor under you and as such being your agent and servant, excavated a trench, &c." The proposition that he was an agent and servant may not be strictly tenable in law, but the individual was specified by the use of the word "contractor," his position was particularised, and the various acts which caused the damage are clearly and plainly set out. While, therefore, the plaintiffs must of course be limited to the cause of action in the said notice set forth, I hold that the cause of action is wide enough to enable the plaintiffs to maintain this suit, and I find the 5th and 6th issues accordingly.

The next point is whether the defendant is liable for the acts of his contractor in the present suit. The case of *Ullman v. The Justices of the Peace for the town of Calcutta*, 8 Beng. L. R., 265, has been cited to [311] show that if a person has to do a lawful act, and he employs a competent person to do that lawful act, and damage occurs, the original employer is not liable; (see also *Steel v. The South-Eastern Railway Company*, 16 C. B., 550). Since, however, this case was decided, the law has been somewhat modified. The case of *Dalton v. Angus*, 6 Ap. Ca., 740, must now be taken as embodying the law on the subject. In that case, at page 829, Lord BLACKBURN says: "Ever since *Quarman v. Burnett*, 6 M. & W., 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the

contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot relieve himself from liability to those injured by the failure to perform it—*Hole v. Sittingbourne Railway Company*, 6 H. & N., 488; *Pickard v. Smith*, 10 C. J. (N. S.), 473; *Tarry v. Ashton*, 1 Q. B. D., 314." And at page 831 Lord WATSON says: "When an employer contracts for the performance of work, which, properly conducted, can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is, therefore, liable, as well as the contractor, to repair any damage which may be done."

This law is affirmed in *Hughes v. Percival*, 8 Ap. Ca., 443. The propositions of law so laid down apply to the present case. The work here to be performed was hazardous, and a duty was cast on the [312] defendant in respect of it by reason of the plaintiffs having a right of support from the ground on which the defendant was operating. I find the 1st and 7th issues accordingly.

It only remains to deal with the question of fact raised in the 2nd, 3rd and 4th issues. (His Lordship referred to the evidence and continued:—) It is clear that the trench was affecting the stability of the house; while the trench was there, the house was sensibly getting into a more and more unsafe condition; and nothing shows this more conclusively than the fact that it was hurriedly filled up immediately the condition of the house became known, and was not proceeded with until after the house had been pulled down. There is a great conflict of evidence as to the way in which the trench was dug. Practically speaking, I do not think that it makes very much difference whether the trench was dug all at one time and along the whole front of plaintiffs' house, or by lengths or along part of the front only, or whether it was shored at all or not, or whether a bridge of earth was left or not. To lay the drain so deep and so near to the plaintiffs' house was admittedly a hazardous operation and one that required great care and precautions. The worse the condition of the plaintiffs' house the more care and the greater precautions were necessary. There is no doubt that sufficient care and precautions were not taken, and the result was that the plaintiffs' house was undermined, its foundations slipped, its floor and walls cracked, and became unsafe and ruinous. The evidence of H. A. Kanga as to the condition of the trench, when he saw it, is very strong; there is no evidence on the defendant's side at all to be compared with it for certainty or credibility. I must believe him fully as to the facts on which he has given evidence. It is quite clear that there was no shoring used in the trench. No two witnesses for the defendant agree as to the extent of the shoring they allege was there. Moreover, if there had been shoring, it would have been known what was done with it when the trench was so hurriedly filled up. Not much reliance can be placed on witnesses who, we find, see shoring which never existed, and who do not see a trench 12 feet long by 2 feet deep, which the contractor of the work, Kesow himself, a witness called by the defendant, says that he excavated. If the witnesses would [313] not see this trench, it is hardly surprising that they would not see the much deeper trench that evidently was there.

It is unnecessary to say more or discuss the evidence at any greater detail. I have purposely not gone into the expert evidence, the evidence, that is, of persons who examined the premises after the mischief had been done and the plaintiffs' house demolished, for, as I said before, it is, in my opinion, almost useless. It is no assistance to be told in one breath that a crack might be caused in one

way, and in another breath that it might also be caused in two or three other ways. No doubt such injuries as this house had sustained might have been caused in other ways than by the disturbance of the trench, but they could have been caused by it; and on the evidence it is clear that, in point of fact, they were caused by it, and by nothing else.

I find the issues 2, 3 and 4 accordingly. The amount of damages claimed has hardly been disputed, and is proved in the case. I pass a decree for the plaintiffs for Rs. 3,812-7-0 and costs.

Attorneys for the Plaintiffs:—Messrs. *Payne, Gilbert and Sayani*.

Attorneys for the Defendant:—Messrs. *Crawford, Burder, Buckland and Bayley*.

NOTES.

[As regards liability for the negligence of the contractor, see also 4 Bom., L. R., 914; *Handaker v. Idle U.D.C.*, (1896) 1 Q.B. 335 C. A.; *Penny v. Wimbledon Urban Council*, (1899) 2 Q. B. 72 C. A.]

[17 Bom. 313]

INSOLVENT JURISDICTION.

The 13th, 20th, 26th, 27th and 28th July, and 4th, 5th and 6th August, 1892.

PRESENT:

MR. JUSTICE FARRAN.

In the matter of Hormarji Ardesir Hormarji, an Insolvent.

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21), Secs. 50 and 51—Conduct of insolvent amounting to offences within those sections—Conduct of insolvent considered with reference to the following charges filed against him by opposing creditors, viz., reckless speculation; contracting debts without reasonable expectation of paying them; misconduct in contracting debts; concealment of property; obtaining forbearance by false representations; contracting debts by false pretences; undue preference.

The insolvent had for many years carried on business in Bombay as a merchant. His firm (Messrs. B. and A. Hormarji) had been established in 1830 by his uncle and father. On the death of the latter in 1882 the insolvent was left the sole surviving partner, and from that time until his failure, he carried on the business [314] alone. The failure took place in April 1891, and on the 1st May 1891, he was adjudicated an insolvent. His liabilities were stated to be Rs. 47,98,591; his good assets Rs. 5,13,903 and his doubtful assets Rs. 60,014. His discharge was opposed by six banks in Bombay with which he had had dealings. The grounds of opposition were as follows:—

(1) Reckless speculation; (2) contracting debts without any reasonable expectation, at the time when the same was contracted, of paying the same; (3) gross misconduct in contracting debts; (4) concealment of property; (5) obtaining forbearance from the opposing creditors by making false representations to them; (6) contracting debts by means of false pretences; (7) fraudulently and with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due by the insolvent.

It appeared that down to the end of 1889 there was nothing in the dealings of the firm to which objection could be taken. In the first half of the year 1890 he must have sustained

heavy loss, as his mercantile assets over liabilities, which on 31st December 1889, were Rs. 5,50,794, were on the 30th June 1890, reduced to Rs. 2,29,612. The charges, however, against the insolvent were based upon his conduct subsequently to the latter date. On that day (30th June 1890,) the insolvent nominally possessed four lakhs of rupees, the saleable value of which was about 2½ lakhs. With his finances in this state the insolvent speculated in exchange, and in six months (*viz.*, before the 31st December 1890,) he had lost his four lakhs of nominal capital, and 19 or 2½ lakhs of rupees besides. The Court held,

(1) As to the first ground of opposition, that the insolvent was guilty of rash and reckless speculation. This, however, was not an offence within the meaning of section 51 of the Indian Insolvent Act (11 and 12 Vic., c. 21). When the insolvent entered into the contracts which had resulted in the loss he had a fair capital, and though his speculations were excessive in amount he had a fairly reasonable expectation that there would not be such a fall in exchange as would more than absorb his assets.

(2) As to the second and third grounds of opposition, that they were proved in respect of the insolvent's transaction subsequently to December 1890, and that the insolvent was guilty of gross misconduct in contracting debts having no reasonable or probable expectation, at the time when they were contracted, of paying them, and that his conduct fell within the purview of section 51 of the Indian Insolvent Act. In December 1890, the insolvent was bankrupt to the extent (at all events) of over 16 lakhs, and had on hand large forward contracts which then showed a further probable loss. In that position he entered into further large speculative sales of exchange. He had then no assets with which to meet any loss.

(3) As to the fourth ground of opposition, that it was proved.

(4) As to the fifth ground of opposition, that it was not established. On 18th April 1891, the insolvent called a meeting of creditors and laid a not very candid or truthful statement of his affairs before them. Nothing was then arranged, and the meeting was adjourned for a week, in order that a committee should examine the insolvent's position, &c. It was understood and arranged that in the meantime no steps should be taken against the insolvent, and that he should keep (315) his affairs *in statu quo*. The insolvent, however, swore that he understood he was to make no large payments, but that he was to keep the firm going. During that week the insolvent paid Rs. 3,193 due on a bill to one of the banks and Rs. 172 on redraft account, a few insignificant current expenses and Rs. 1,000 to his solicitors, who were preparing a trust-deed to be carried before the creditors. The Court was of opinion that the conduct of the insolvent in making these payments did not amount to the offence charged in the fifth ground of opposition, *viz.*, obtaining forbearance from the opposing creditors by making false representations to them.

(5) As to the sixth ground, that it was not established. On the 14th March the insolvent in answers to enquiries had assured the manager of the Chartered Bank that his firm was quite sound and solvent, it being then to his knowledge hopelessly insolvent. On that day the manager accepted the insolvent's bills for £20,000 for which security was given and subsequently the insolvent sold one of his own bills for £10,000 to the bank. This, however, was in pursuance of a previous contract. The evidence of the manager showed that it was because of this contract, and not because of the false representation of the insolvent, that he purchased the draft for £10,000. The Court was, of opinion that the transaction did not come within section 50.

(6) As to seventh ground (undue preference), that it was not proved. On the 16th April 1891, the day but one before the insolvent held a meeting of his creditors, he sent £5,000 to Messrs. Elliott & Sons in England. That firm had accepted bills of the insolvent which he was bound to take up, but the earliest did not fall due until the 20th May 1891. His practice had been to remit money a day or two before bills became due. The Court was of opinion that the transaction was not an undue preference within section 50. It was no doubt a voluntary payment, but it was not shown to be a fraudulent discharge of a debt within the section. A mere voluntary payment of a debt is not within the purview of the section. Such a payment must be fraudulent and must be made with the intent of diminishing the sum to be divided amongst creditors, or of giving an undue preference to any of the creditors.

From the mere fact of a voluntary payment, fraud of a penal nature cannot be inferred. Here nothing more was proved than a voluntary payment by a man in insolvent circumstances. The insolvent knew he was in difficulties, but was of so sanguine a nature that he believed he could surmount them, and so £5,000 were sent rather with a view to keep up his English connection than with the fraudulent intent of giving an undue preference. Where an undue preference is made penal the Court must be satisfied that the guilty intention necessary to constitute the offence existed in the mind of the insolvent, and ought not to assume it unless the circumstances point to no other probable conclusion.

The release by an insolvent of a debt due to him without receiving payment would undoubtedly fall within the scope of section 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21).

THE insolvent for many years carried on business as a merchant in Bombay under the firm of Messrs. B. and A. Hormarji & Co. [316] He was adjudicated an insolvent on the 1st May 1891. His liabilities were stated to be Rs. 47,98,591, his good assets to be Rs. 5,13,903, and his doubtful assets to be Rs. 60,014.

His discharge was opposed by the Chartered Mercantile Bank, the Chartered Bank of India, Australia and China, the National Bank of India, the Hongkong and Shanghai Bank, the Agra Bank and the New Oriental Bank.

The grounds of opposition filed were as follows :—

- (1) Reckless speculation.
- (2) Contracting debts without any reasonable expectation, at the time when the same was contracted, of paying the same.
- (3) Gross misconduct in contracting debts.
- (4) Concealment of property.
- (5) Obtaining forbearance from the opposing creditors by making false representations to them.

The above grounds of opposition were common to all the opposing creditors. The Chartered Bank also filed a separate ground of opposition, viz. :—

- (6) Contracting debts by means of false pretences.

After the cross-examination of the insolvent, leave was given to file a further ground of opposition, viz. :—

- (7) Fraudulently and with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due by the insolvent.

He now applied for his discharge under section 47 of the Indian Insolvent Act, Stat. 11 and 12 Vic., c. 21.

Inverarity and *Scott* for the Opposing Creditors :—They cited, as to the first three grounds of opposition, *Ex parte Heyn*, L. R., 2 Ch., 650; *Ex parte Johnson*, 4 DeG. and Sm., 25; *Ex parte Dornford*, 4 DeG. and Sm., 29; *Ex parte Rufford*, 2 DeG. M. and G., 234; *Ex parte White*, 14 Q. B. D., 600; *Ex parte Salaman*, 14 Q. B. D., 936. As to undue preference, *Nunes v. Carter*, L. R., 1 P. C., at p. 348, per Lord WESTBURY; *Brown v. Kempton*, 19 L. J. (C. P.), 169; *Rust v. Cooper*, 2 Cowp., 629, at p. 634; *Butcher v. Stead*, L. R., 7 Eng. and Ir. App., 839; [317] *In re Skegg*, 25 Q. B. D., 505; *Ex parte Griffith*, 23 Ch. D., 69; *Ex parte Hull*, 23 Ch. D., 695; *Singleton v. Butler*, 2 Bos. & P., 283; *Wilson v. Balfour*, 2 Campbell, 579. As to false pretences, *Reg. v. Welman*, 6 Cox, Cr. Ca., 153; *Reg. v. Willot*, 12 Cox, Cr. Ca., 68. Reference was also made to sections 50 and 24 of the Indian Insolvent Act; Stat. 11 and 12 Vic., c. 21, corresponding to sections 48 and 32 of Stat. 7 Geo. III, c. 57. Also to Stat. 1 and 2 Will. IV, c. 56; English Bankruptcy Act, 1849; Stat. 12 and 13 Vic., c. 106, s. 256; Stat. 34 and 25 Vic., c. 154, s. 221; Stat. 32 and 33 Vic., c. 71, s. 13.

Lang (Acting Advocate-General), *Jardine and Russell* for the Insolvent :— They cited *Morgan v. Brundrett*, 5 B. & Ad., 289; *Ex parte Downman*, 32 L. J., (Bankruptcy), 49; *Miller v. Sheo Pershad*, L. R., 10 Ind. Ap., 98; *Ex parte Jenkins*, 39 W. Rep., 430; *Punnett v. Vinayak Pandurang*, 9 Bom. H. C. Rep., 27. They referred to Stat. 12 and 13 Vic., c. 106; Stat. 6 Geo. IV, c. 16, s. 73.

Farran, J. :—Hormarji Ardesir was adjudicated an insolvent on the 1st May 1891. The debts and liabilities of the insolvent, as stated in his schedule, amount to Rs. 47,98,591-13-7, against which he was possessed of assets amounting to Rs. 12 or 14 lakhs according to the value to be properly placed upon them. They have realized Rs. 11,86,826-8-4. There may possibly be sums still recoverable from certain insolvent estates, and from the firm of Matheson & Co., of London, but substantially the above are the figures which I have to take into account in dealing with this matter.

The insolvent now seeks for his personal discharge under section 47 of the Indian Insolvent Act, 11 and 12 Vic., c. 21. His discharge is opposed by the following banks, who are his creditors for the following sums :—The Chartered Mercantile Bank, Rs. 4,05,430-10-1; the Hongkong and Shanghai Bank, Rs. 9,92,403-11-6; the National Bank, Rs. 8,65,622-14-10; the Agra Bank, Rs. 12,42,774-0-11; the Chartered Bank, Rs. 2,16,336-1-8; and the New Oriental Bank, Rs. 3,38,123-4-5. These sums aggregate Rs. 38,60,690-11-5. The remaining creditors are creditors [318] for, comparatively speaking, small sums, from Rs. 5,000 downwards, except Mulchand, who is a creditor for Rs. 11,327-1-5, for brokerage; Kushalchand, who is a creditor for Rs. 14,818-7, in respect of a draft sold against pearls, of which account sales were not received when the schedule was made up; Premchand Roychand, who is a creditor for Rs. 14,754-6-9, for his share in the Coorla Mill commission, which he had not received; and the Comptoir de Paris, who are creditors for Rs. 17,250-12-2; and also excepting John Elliott & Sons, of London, who are creditors for Rs. 3,33,120-12-11; and Matheson & Co., of London, who are entered in the schedule as creditors for Rs. 2,58,195-9-5; but on the other side are entered as debtors in Rs. 4,91,187-8-9. These accounts of Matheson & Co., are not as yet adjusted, and the balance may be in favour of the insolvent. If this is so, the total debts of the insolvent will be reduced by about Rs. 2,58,195-9-5 which would bring them to Rs. 45,40,396-4-2. The above figures have not been proved before me, but they are taken from the schedule, and may be assumed, for the purpose of this enquiry, to be correct. It may, therefore be taken, that the principal creditors of the insolvent, with the exception of John Elliott & Sons, of London, are all opposing his discharge.

The grounds of opposition filed were :—(1) Reckless speculation; (2) contracting debts without having any reasonable or probable expectation, at the time when the same were contracted, of paying the same; (3) gross misconduct in contracting debts, in that his whole debts, so greatly exceeded his means of providing for the payment that during the time when the same were in course of being contracted (reference being had to his actual and expected property) as to show gross misconduct in contracting the same; (4) concealment of property; (5) obtaining forbearance from the opposing creditors by making false representations to them. These grounds of opposition are common to all the opposing creditors. The Chartered Bank has filed a ground on its own behalf in addition to the above, which it also relies on; (6) contracting debts by means of false pretences.

At the close of the cross-examination of the insolvent, counsel for the Chartered Mercantile Bank applied for leave to add [319] several other grounds of opposition. All of the facts relied upon in support

of these were known to the opposing creditors when they filed the above grounds, or were within their means of knowledge. I refused to allow this to be done in the greater number of cases; as, for reasons which I then gave, I considered that the insolvent might have been prejudiced in his defence by not having had them put forward and relied upon at an earlier stage of the case, and as I thought that the power given to the Court by Rule 20 should be exercised with great caution. I allowed a ground of opposition resting on an admitted payment of a sum of £5,000 to John Elliott & Co. by the insolvent on the eve of his insolvency to be added, as the facts relating to it were within the actual knowledge of the insolvent, and of no one else. It is now added as ground (7), *viz.* fraudulently, with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due from the insolvent.

The first ground of opposition is not within the words of section 50 or 51 of the Insolvent Act,—that is to say, it is not specifically stated as a ground for putting the provisions of either of these two sections in force. I have no doubt but that, if it were proved, I should be justified on account of it in adjourning the insolvent's discharge under section 47 of the Act. It has been so ruled in *Re Gopal Chunder Seal*, 2 Boulnois, 119, but I consider that unless the facts bring the case within the second and third heads of opposition, I have no jurisdiction to treat it as an offence under section 51. It clearly does not fall within the purview of section 50.

The insolvent at the time of his adjudication was the sole owner of the firm of B. & A. Hormarji. The firm had been established in 1830 by the uncle and father of the insolvent. On the death of the latter in 1882 the insolvent was left as the sole surviving partner, and continued so until his failure. There is no evidence as to what the capital of the firm was when the insolvent became the sole owner of it, but since the adjudication, balance-sheets have been prepared at the expense of the estate, [320] and under the supervision of the insolvent, which purport to show the position of the firm at the close of 1886 and subsequent years. These balance-sheets have been compiled from the accounts in the ledgers of the firm. Their accuracy was not disputed before me, save in two particulars, which are these:—

(1) Towards the close of each year it was not uncommon for the firm to draw and sell bills of exchange on London constituents, and receiving the proceeds, to place them to the credit of the firm with some of its bankers. The sums thus received by the insolvent's firm were received for the purpose of being remitted to London to meet the bills thus drawn which had to be met by the firm, and being thus credited in the books appear as part of the assets of the firm. Against that asset the liability to meet the bill should of course appear as a debit of the firm. It was, however, the practice not to enter that debit in the accounts of the year about to close. The practice was to enter that debit at the beginning of the following year, when the proceeds of the bill were remitted by wire or otherwise to London to meet the bill. The moneys, when drawn from the bankers for this purpose and remitted, were credited to the banking accounts and debited to the constituent on whom the bill was drawn, and the bill drawn was at the same time placed to his credit. The accounts then became correct in the following year. This practice, it was said, was adopted in order to enable the constituents' accounts to be balanced to the end of the year, so that it might exactly tally with the account of the London constituents as balanced in London to the end of the year. There was nothing improper in this way of keeping the books; but whenever it occurred, the balance-sheets, made up from the ledgers, failed to show the true position of

the firm by the amount of bills drawn on London and sold and not entered in the balance-sheets as a liability, though the proceeds of such bills appear in them as an asset. I shall hereafter, for the sake of brevity, refer to such bills as "suspense bills."

(2) The other particular in which the balance-sheets are objected to is that the assets of the firm are said to be overvalued in them. This objection is principally urged against the valuation of the Coorla shares of the insolvent. The value of [321] the assets is put down in the balance-sheets as it is shown in the ledgers. The original cost price is entered there. In this respect the opposing creditors ask the Court, I think, to adopt too strict a view. When a merchant is about to embark upon a large speculation he is bound to consider his position in order to ascertain whether, if it results in loss, his assets will suffice to meet the probable loss. In estimating his assets for this purpose, he is of course under an obligation not to fraudulently or dishonestly overvalue them, but, on the other hand, he is not bound to subject each item to a strict scrutiny. A sanguine man will estimate the value of his assets at a higher figure than a more desponding or perhaps a more cautious man will do. In judging of a man's conduct by after events, I think that the Court should acquit him of moral or commercial impropriety if he estimates his assets honestly at the figure which he at the time of entering into the speculation believed that they were worth. The balance-sheet for 1886 shows an excess of assets over liabilities of Rs. 5,08,928; that of 1887 shows an excess of Rs. 6,04,226; that of 1888 shows an excess of Rs. 5,93,933; that of 1889 shows an excess of Rs. 5,50,794; and that of the first six months of 1890, ending June 30th, shows an excess of Rs. 2,29,612. These balances are made up after the drawings of the insolvent for each year (whatever they may have amounted to) had been entered in the books. The Hormarji house property is not included amongst the assets.

The insolvent states that during this period, ending 30th June 1890, he was doing a safe and profitable business which brought him in an income of about one lakh of rupees per annum. The business was partly commercial, partly financial, but the latter portion of it was the more important. It is necessary to consider its nature and extent. The transactions were carried on with Hamborough & Co., Matheson & Co., the Chartered Mercantile Bank in London, the National Bank of India in London, and on a small scale with Elliott & Co. They were complicated. I will describe the nature of them with Hamborough & Co. The insolvent used to draw bills on Hamborough & Co. usually at four months' usance. These he sold in Bombay. With the proceeds he purchased bills drawn at six months' usance. [322] Thus his transactions were more or less simultaneous. The six months' bills he remitted to Hamborough & Co. with directions to discount them, and with the proceeds to take up the four months' bills. The profit on the transaction consisted in a nice calculation of the London discount rate as compared with the cost in Bombay of the six months' bills. To enable him to make this calculation he received daily a telegram giving the London rates. Sometimes the bills drawn on Hamborough & Co. were demand bills, which he sold, and with the proceeds purchased six months' bills. By wire he advised Hamborough & Co. to discount the six months' bills to arrive, and thus secured the rate. The profit was made in the same way as in the case of the four months' bills. Sometimes he drew demand bills on Hamborough & Co., sold them in Bombay, used the proceeds until the demand drafts were about to fall due, and then remitted the proceeds of the demand drafts or their equivalent by wire to meet the demand drafts. The profit in this case was that acquired by the use of the money in Bombay.

With Matheson & Co. the process was different. He drew on them at four months', and sold the bills in Bombay, remitted the proceeds by wire (telegraphic transfers) on demand bills to Matheson & Co. In London, Messrs. Matheson & Co. allowed him interest on the proceeds received from the telegraphic transfers on demand bills at 5 per cent. until the four months' bills became due, and then met the four months' bills with such proceeds. The transactions with the banks were similar, and there were subsidiary arrangements which it is not necessary to detail. The financial business with Messrs. Elliott & Sons was comparatively small in amount. The insolvent stated that he needed to sell and buy bills to meet the requirements of this class of his business to the extent of about a million pounds sterling per annum. As about three sets were drawn during the year there would be about £300,000 to £400,000 current at a time. It will readily be seen that a very small rate of profit in discount on such large sums would bring in a considerable income. The amounts I have given are only rough estimates. It would appear from the cross-examination of the insolvent that the figures are probably understated. The statement of [323] the mode of business is not intended either to be strictly accurate.

With reference to this financial business it is to be observed :—(1) That it rested solely on credit and could not be carried on unless the parties to it were in high repute as to their solvency in the commercial world. (2) That, resting as it did upon credit it required little, if any, capital of the insolvent to be embarked in it, and enabled him to keep all, or almost all, his capital invested in shares and Government notes upon which he received dividends and interest, and it also enabled him to finance the Coorla Mills, of which he was the agent. (3) That as long as it was carried on through perfectly solvent houses, there was little, if any, risk of loss. As the transactions were embarked in on a calculation based upon actual discount rates and the actual state of the money market, it was not in its nature speculative. The element of speculation entered into it when forward contracts in exchange were made in order to obtain favourable rates for the bills, which the insolvent proposed to draw for his financial undertakings. The houses with which the insolvent did business were houses, it is admitted, of first-class repute. The evidence before me does not enable me to determine with exactness whether those *a priori* conclusions were borne out by corresponding results, except that the insolvent stated that it was so. There were no profit and loss accounts for each year put in evidence, and the balance-sheets, on account of the suspense bills not appearing in them, and the drawings of the insolvent for each year not being shown, are only approximate guides. The small variation in them down to 31st December 1889, however, lends confirmation to the insolvent's statement. The fair inferences to be drawn from them, coupled with the evidence of the insolvent, is that the capital of the firm did not materially alter in amount down to that date, and that he drew out for expenditure, in one form or other, all the profits of the firm, and possibly a little more.

In addition to the above financial business, the firm did ordinary commercial business, taking consignments of produce, pearls, &c., for sale in England on account of native shippers, [324] and selling goods consigned to the firm here from abroad. There is no evidence as to the extent of this business. It seems to have been of the ordinary character, and conducted with prudence. To carry it on would require the sale of bills against produce in Bombay to a considerable extent.

Down to the close of the year 1889 there is nothing, therefore, shown against the insolvent to which exception can be successfully taken. In the first half of 1890 the insolvent must have met with heavy losses. His mercantile

assets above liabilities, which on the 31st December 1889, stood at Rs. 5,50,794, were reduced on the 30th June 1890, to Rs. 2,29,612. This period has not been examined into, and the cause, therefore, of the loss has not been shown. The charges against the insolvent are based upon his conduct subsequently to the latter date. It becomes, therefore, necessary to consider his exact position on the 30th June 1890, as it appears from the balance-sheet (Exhibit No. 6).

(After stating the figures His Lordship continued):—Adding this to his mercantile capital, the insolvent's estate upon the most favourable estimate showed a balance in his favour of four lakhs on the 30th June 1890. It was, however, in a very embarrassed position. Except in the Oriental Bank, the accounts in all the other banks were largely overdrawn, to the extent of more than Rs. 5,30,000, on, I presume, the security of his available property. However, he nominally possessed four lakhs. Its salable value was about 2½ lakhs.

With his finances in this state the insolvent began (or rather continued, for he began his operations earlier in the year) to speculate in exchange, or, as he expressed it, "to work for a rise in exchange." The silver market, which governs exchange, was then in a very excited state. "Working for a rise in exchange" was, in effect, the same as making large purchases of silver deliverable to him at forward dates. On account of the great number of exchange transactions which the firm necessarily had to enter into for the purpose of its financial business, it is very difficult to separate these speculative transactions in exchange from the rest of the business. The two, in fact, were worked, the one with the other. This difficulty is increased by the insolvent not [325] having handed over any register of his forward contracts to the Official Assignee. It would be possible to ascertain the particulars and amount of the forward contracts from the lists of sales and purchases made out by the different banks, but the process would be a laborious one. From fear of falling into error I have refrained from it. A less accurate estimate is sufficient for the purposes of this judgment. In 1890, the insolvent sold bills to the extent of £4,071,800, and bought in the same year bills amounting to £2,681,400. The latter figure does not include some bills which he purchased from Messrs. Ralli Brothers and Messrs. Volkart Brothers. The deduction of a million pounds from each side on account of the insolvent's financial business leaves his speculative business as sales, £3,071,800; and purchases, £1,681,400; the latter figure being liable to increase on account of purchases from Messrs. Ralli Brothers and Messrs. Volkart Brothers. These speculative transactions were, therefore, entered into on an enormous scale. Unfortunately, I cannot divide the figures between the early and the latter half of the year 1890. The insolvent's account shows a total loss in exchange between 30th June 1890, and his failure in 1891 of Rs. 37,50,725. In the statement he made out for his creditors in April 1891, he roughly divided his losses into periods, putting the net losses, which meant his realised losses, from the 1st of July to the 11th of November 1890, at Rs. 16,49,951-7-3 and from the latter date to the 31st December 1890, at Rs. 2,34,802-3-0. This statement makes the total losses in exchange to be Rs. 32,54,836-11-9 only, which is too small. The above figures are, therefore, probably under-estimated. The statement, however, was made out for the insolvent himself, and he admits the figures to be correct as far as they go. The balance-sheet made out down to 31st December 1890, make the insolvent's mercantile assets to be less than his liabilities by Rs. 6,11,669; or, when the Hormarji house is taken into calculation, by Rs. 4,11,669. This balance-sheet is, however, wholly incorrect, in not including "suspense bills" to the extent, as estimated by the insolvent, of £170,000.

On the 31st December 1890, therefore, the insolvent's liabilities must have exceeded his assets by considerably more than [326] Rs. 20,00,000. The loss on speculation by this mode of computation amounted to at least 23 lakhs of rupees between July 1st and December 31st. Whether this figure is taken on the insolvent's statement, the result is, that the insolvent, starting with a nominal capital of 4 lakhs, had in these enormous speculations lost it, and some 19 or 23 lakhs of rupees besides, before the 31st December. Within the limits of his means the insolvent was at liberty to speculate if he pleased, but this speculation is, in my judgment, far in excess of the amount which his capital, as it stood in July 1890, justified him in entering into. The result is the same if the final account is considered. Starting in July 1890, with a nominal capital of 4 lakhs, he has lost before May 1891, at least Rs. 37,00,000.

This, in my judgment, amounts to speculation both rash and reckless. That, however, as I have said, is not, in terms, an offence under section 51 of the Indian Insolvent Act. What I have to determine under that section is, whether the insolvent's debts, or any of them, were contracted without his having any reasonable or probable expectation, at the time when he contracted them, of paying the same, or whether his whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in the course of being contracted (reference being had to his actual and expected property) as to show gross misconduct in contracting the same. Now as to the contracts, which culminated in the loss of Rs. 16 lakhs or more in November 1890, I do not think I shall be justified in holding that they were entered into without reasonable or probable expectation of fulfilling them in paying the losses which might result from their breach. When the insolvent entered into them, he had a fair capital; though the rise in the silver market had been rapid and considerable, there was not, according to the advice under which the insolvent acted, any apparent reason why there should be any rapid or considerable fall, and appearances pointed only to ordinary fluctuations of the market and a probable rise. The insolvent, therefore, though his forward contracts in the beginning of the second half of 1890 were excessive in amount, had a fairly reasonable expectation that there would not be a fall in exchange, or, at all events, such a fall as would more than absorb his assets.

[327] The position in November and December 1890, had, however, changed. The insolvent was then bankrupt to the extent of 16 to 20 or 23 lakhs. It is not very material which figure is adopted, and, moreover, had on hand forward contracts to a large extent, which then showed a further probable loss. In this position he entered into further large speculative sales of exchange. I cannot give the exact figures without an elaborate examination of the returns made by the bank, but the bills sold by the insolvent in 1891, before his failure in April, amounted to £1,365,700, while those purchased by him were £1,847,900. A considerable number of the latter were cross purchases to close previous sale transactions. Deducting one-third of a million sterling from the figures on the other side, for financial bills sold and purchased, we find that he sold about £1,000,000 when absolutely and irretrievably insolvent. In so far as these transactions consisted of bills sold under forward contracts, the action of the insolvent was simply gambling with the moneys of the banks. From an examination of the list of sales of bills made out by the banks, I have satisfied myself that the £1,000,000 of bills sold included a large amount of forward sale; the insolvent indeed himself admits it. This gambling with the creditors' moneys had been going on at least as far back as the 11th November 1890. It would perhaps be incorrect to say that the insolvent when he contracted fresh liabilities after 11th November 1890, had no probable or reasonable expectations

of being able to pay them, for by keeping up appearances and selling more bills he might have expected to be able to satisfy these particular liabilities by incurring fresh ones, but I cannot entertain any doubt, but that the liabilities incurred in respect of forward contracts after the 11th November 1890, were, when they ripened into debts, such as to indicate gross misconduct in contracting the same. The assets with which he could hope to meet them were a huge minus quantity.

I am, therefore, of opinion that the third ground of opposition is established, and that the insolvent's conduct falls within the purview of section 51 of the Act. It is argued by the Advocate-General that the conduct of the banks in entering into these forward contracts with the insolvent was such that they are not [328] now entitled to oppose his discharge upon the above ground. I do not yield to that argument. No doubt the Board of the Chartered Bank thought that he was speculating. The Home Board advised their Bombay agent of this at the end of 1890, and several times again in 1891, and the agent entered into few fresh unsecured transactions with him after that. In January it was proposed that all the banks should make up a statement, so as to ascertain the extent of Hormarji's dealings, but nothing came of it. The managers at the beginning of 1891, or quite at the end of 1890, called the broker Mr. Weber's attention to the magnitude of the insolvent's operations. I think that at this time they certainly suspected that Mr. Hormarji was speculating. It would, however, have been a strong measure to have refused his forward bills at that time. It is the business of the banks to sell their own bills, forward as well as ready, and to cover themselves by buying the forward or ready bills of merchants. When this is done there is no speculation. It is difficult for banks to inquire, in the case of merchants offering to sell their forward bills, whether they are speculative sales or not.

I think that I should not be justified in deciding that banks forfeit the protection which the provisions of section 51 afford them, because they do not refuse the forward bills of a finance-house like Hormarji's, which they believed to be solvent, on the suspicion that they are speculative in character. As to the position and strength of the house, the magnitude of its operations for so many years, and the boastful way in which Hormarji was accustomed to speak of his firm, no doubt misled them. At the same time the extreme facilities which the banks afforded the insolvent in carrying on his speculations must have been a great temptation to him to continue them. I shall take this into account when dealing with the insolvent's conduct.

The fifth ground of opposition, that of obtaining forbearance fraudulently and by means of false pretences, I do not consider to be established. On the 18th of April 1891, the insolvent called a meeting of the bank managers, and laid a not very candid or truthful statement of his affairs before them. Nothing was [329] then arranged, and the meeting was adjourned for a week, but a committee of inspection on behalf of the banks to examine the insolvent's position, and that the insolvent should lay some definite proposal before the banks. It was understood at the meeting and expressed that the banks in the interval should take no steps against Hormarji, and that he should keep his affairs in *statu quo*. Hormarji says that he understood that he was to make no large payments, but was to keep the firm going. During the week Hormarji made a payment of Rs. 3,193-15-3, due on a bill, to one of the banks, and a sum of Rs. 472-6-1 on re-draft account, a few insignificant current expenses, and Rs. 1,000 to his solicitors. The payment of Rs. 3,193-15-3 to one of the banks shows that it was not intended that no payments whatever were to be made. The payment of Rs. 1,000 to the solicitors, who were preparing a trust-deed to be laid before the

creditors, does not seem to me, in spirit, to be a breach of the somewhat indefinite understanding which the opposing creditors rely on. I fail, however, to see how the making of this payment subsequently to the meeting can be said to be an obtaining of the forbearance which was granted at the meeting fraudulently or by means of false pretences. It is not shown that Hormarji at the time of the meeting intended to make this payment.

The next matter to be considered is the ground of opposition relied on by the Chartered Bank, that the insolvent contracted a debt to them by means of false pretences. The facts may be briefly stated. On the 14th of March the Manager, Mr. Stiven, received a telegram from his head office to the effect that it was rumoured in London that the firm of B. & A. Hormarji were in difficulties, and asking him to report. Mr. Stiven sent for Hormarji and made inquiries in reference to the truth of the rumours mentioned in the telegram. It is unnecessary to go into the details of the interview. The result was that Hormarji led Mr. Stiven to believe that though his firm had met with losses, they were such as the firm was well able to bear, and that the firm was quite sound and solvent. It was at this time absolutely and hopelessly insolvent to the knowledge of Hormarji, though he may have entertained the [330] insane delusion that by a rise in the silver market and by further speculations he would be able to retrieve his position.

That his representation as to his position was a false representation or false pretence is clear enough. It is, however, necessary to bring the case under section 51 that the debt should be contracted by false pretences. On that day Mr. Stiven accepted the bills of Mr. Hormarji himself for £20,000 in lieu of a bank telegraphic transfer which Hormarji had contracted to give him. Mr. Stiven, however, would not do this without security. Security was given and the bills were eventually accepted in London and paid. After this there was one or perhaps two small new unsecured transactions in bills, but the bills were paid. On the 16th April the insolvent sold one of his own bills on Messrs. Matheson & Co. for £10,000 to the bank. This was in pursuance of a contract, dated the 16th July 1890, by which the Chartered Bank had contracted to purchase a bank telegraphic transfer, or a demand draft, on Messrs. Matheson & Co., or Messrs. Hamborough & Co., for £10,000, deliverable between 30th March and 30th April 1891. Under that contract Hormarji was entitled to deliver his own demand bill. The evidence of Mr. Stiven goes to show that it was because he had made this contract that he purchased Hormarji's £10,000 draft, and not because of the false pretence which Hormarji had made to him on the 14th March, though, no doubt, if he had known Hormarji's real position, he would not have taken his demand draft without security. Mr. Stiven would, no doubt, have equally taken it, if he had not received a telegram on the 14th March, and had had no conversation with Hormarji as to his affairs.

Under these circumstances, I think it would be a straining of the law to hold that the debt which arose from the dishonour of the bill for £10,000 was contracted by false pretences. I must, therefore, hold that the sixth ground of opposition is not established.

I now turn to the more serious charges, the fourth and seventh, framed under section 50 of the Act. On the 16th April, the day but one before Hormarji met his creditors, he despatched some time after 2 P.M. a draft of £5,000 to Messrs. Elliott & Sons. [331] That firm had accepted bills of Hormarji's which he was bound to take up, but the earliest did not fall due until the 20th May. His former practice had been to remit moneys to take up such bills a day or two before they became due, but in a few instances he had remitted a week and a fortnight before the bills were payable. In those cases

Messrs. Elliott & Co., on receipt of the money, placed it with a discount house, and credited Hormarji with the interest received. The £5,000 were sent by a telegraphic transfer of the Oriental Bank, which was paid for by a cheque on the Bank of Bombay, where the insolvent had a cash credit on the security of Government paper. There was no financial benefit to be gained by sending this money, and I entertain no doubt that it was sent to lessen the insolvent's liability to Messrs. Elliott & Sons. It was undoubtedly voluntary. The question is whether it is a fraudulent discharge of a debt within the meaning of section 50 of the Act. I do not think that it is proved that it was. Under section 24 of the Act, any voluntary payment made by a man when in insolvent circumstances within two months of his insolvency is deemed fraudulent and void against the assignees of the insolvent, and can be set aside on that ground. This is a section dealing with civil rights. Section 50 is a highly penal section, and in it the word "fraudulent" must have its ordinary meaning assigned to it. The offence of fraudulently discharging a debt is placed among such offences as concealing property, wilfully altering books, and other similar offences of a heinous nature, and the penalty which can be inflicted for it is two years' imprisonment on the criminal side of the jail. It is by no means clear what the section does mean. Releasing a debt due to the insolvent without receiving payment would undoubtedly fall within its scope. A more voluntary payment of a debt is, I think, equally clearly not within its purview. It must be fraudulent and may be made "with the intent of diminishing the sum to be divided amongst creditors, or of giving an undue preference to any of the creditors." From the mere fact of a voluntary payment I do not think you can infer fraud of a penal nature. I was myself for some time strongly inclined to limit the fraudulent discharge of a debt to the case where an insolvent releases a debt due to himself without consideration, but am now disposed [332] to think that it is of wider import. The intent to give an undue preference to a creditor occasions the difficulty. That can only be done, I think, by paying or securing him. I doubt if the words can be given effect to (as suggested by Mr. Lang) by concealing a debt due from the insolvent with intent of preserving it always for the creditor, notwithstanding the insolvency proceedings. However that may be, I think nothing more is proved here than a voluntary payment by a man in insolvent circumstances. When it was made, I think that Hormarji had not the idea of the Insolvent Court before his mind. He knew that he was in difficulties, but such is the sanguine nature of the man, that I feel pretty confident that he thought his financial and commercial business was of so valuable a nature, and that his commission from the Coorla Mills was so valuable an asset, that his creditors would certainly on terms allow him to carry on the one, and continue to receive the other, and accept payment of their debt by instalments, and that his only doubt was whether he could not continue to carry on his business without calling his creditors together, a doubt which his consultation with Mr. Craigie on the evening of the 16th April at once dispelled. If the insolvent entertained these views, I do not think that I can hold that he sent the £5,000 to Messrs. Elliott & Sons fraudulently with intent to diminish the sum to be divided amongst his creditors, or to give an undue preference to Messrs. Elliott & Sons. I should rather say it was done with a view of keeping up his English connection and to prevent Messrs. Elliott & Sons refusing to do business with him any longer. I do not believe the insolvent when he says that he did it as a piece of skilful financing. In that point of view it was detrimental. The cases cited by Mr. Inverarity are all, with one exception, decided (under a wholly different statute) cases arising out of the civil liability of a creditor voluntarily preferring to restore the payment which he has received. I do not say that they are not useful as guides; but

when the conduct of the insolvent in giving a fraudulent preference is made penal, the Court must be satisfied that the guilty intention necessary to constitute the offence existed in the mind of the insolvent, and ought not to assume it, unless the circumstances point to no other probable, I will not say possible, conclusion.

[333] The last charge against the insolvent is of a painful nature. It has caused me much anxiety. The circumstances connected with it are these:— (His Lordship then discussed the evidence and continued .—) I do not, however, think, as suggested by counsel, that the insolvent formed a deliberate design in November 1891, of setting aside the return commission as a fund for emergencies, or as a provision against insolvency. I am rather inclined to credit his statement that he looked upon the return brokerage as something outside his business, a fund to which his business creditors had no claim, and that when he found himself in the possession of a considerable portion of it, when he was adjudicated an insolvent, the temptation to retain it unnoticed was too strong to be resisted, and that his moral courage was not sufficient to enable him to admit his error when the Official Assignee asked him for an explanation. The sum is too small to support the suggestion of the counsel for the opposing creditors, and it has probably been all spent before now. I must, however, record my finding that the fourth ground of opposition is proved.

For the reasons expressed through my judgment, I feel that a comparatively light punishment will be sufficient to meet the ends of justice in this case. The insolvent, whose discharge has already been suspended for more than a year, will suffer imprisonment, under section 50, for three months, and will after that be entitled to his discharge when he has been in custody at the suit of the opposing creditors, under section 51 of the Act, for twelve months, in all his discharge will thus be postponed for fifteen months from this day. The question whether judgment should be entered up against the insolvent under section 86 can be decided when the insolvent comes up for his discharge.

On the application of counsel the costs of the opposing creditors together with the costs of the adjudication were ordered to be paid out of the estate.

Attorneys for the Insolvent:—Messrs. *Chalk, Walker and Smetham*.

• Attorneys for the Opposing Creditors:—Messrs. *Craigie, Lynch and Owen*.

[334] INSOLVENT JURISDICTION.

The 29th and 31st August, 1892.

PRESENT:

MR. JUSTICE BAYLEY (ACTING CHIEF JUSTICE) AND MR. JUSTICE CANDY.

In the matter of Hormarji Ardesir Hormarji, an Insolvent.

*Insolvency—Insolvent convicted and sentenced to imprisonment under Section 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21)
—Appeal by insolvent under Section 73—Bail—No power in High Court to admit insolvent to bail pending appeal.*

An insolvent was convicted by the Insolvent Court of an offence under section 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) and sentenced to imprisonment. Under section 73 of the Act he appealed against the decision and sentence of the Insolvent Court, and applied to be admitted to bail pending the hearing of his appeal.

Held, refusing the application, that the High Court had no power to admit him to bail.

APPLICATION to admit to bail.

On the 24th August the insolvent was sentenced, see *supra*, pp. 313—333, by FARRAN, J., (sitting as Commissioner in Insolvency) to suffer imprisonment for three months under section 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21). From this decision and sentence the insolvent lodged an appeal under section 73 of the Act. He was in custody, and he now applied to the Appellate Court to be released on bail pending the hearing and determination of his appeal.

Jardine for the Insolvent:—There is no section or provision of the Insolvent Act which deals with such an application as the present, nor have we been able to find any precedent in the records of the Court either for or against such an application. But we contend that the Appellate Court must have power to admit to bail. Otherwise the right of appeal given to insolvents by section 73 would be nugatory. The appeal has been accepted and filed; but, if the insolvent is not admitted to bail, he will have suffered the whole or the greater part of his sentence before his appeal from it can be heard and determined. The right of appeal would thus be a mere mockery.

[BAYLEY, C. J. (ACTING):—The first question to be determined is whether this Court has power to grant such an application as this. By English law a person convicted, and under sentence, [335] cannot be admitted to bail. Even where a true bill has been found by a grand jury against a person, he cannot be bailed.]

The rules of the English law are against me, but I submit that the Indian criminal law is more nearly analogous. At common law, no doubt, there is no appeal from a conviction of an offence. But in India such an appeal is given. The Criminal Procedure Code (X of 1882) does not directly apply to proceedings such as these, but its provisions support the argument that the power to admit to bail must exist in this case where a right to appeal is given.

Scott, for the Opposing Creditors, opposed the application:—This Court is not an Insolvent Court, and can only interfere with proceedings of the Insolvent Court where it is expressly authorized to do so. It has not been given a power to admit to bail.

Cur. adv. vult.

Bayley, C.J. (Acting):—This is a motion on behalf of the insolvent, H. A. Hormarji, that he may be liberated on bail until the hearing and final adjudication of the appeal filed by him from the decision of FARRAN, J. *

On the 24th of August 1892, FARRAN, J., sitting as Commissioner of the Insolvent Court, made an order in the following terms:—

"This Court doth order and adjudge that the said insolvent Hormarji Ardesir Hormarji be forthwith taken into custody of the Jailor of Her Majesty's Common Jail of Bombay on its Criminal Side by virtue of a warrant under the seal of this Honourable Court, to be detained there for a period of three calendar months to be computed from the date of his arrest under this order. And this Honourable Court doth further order and adjudge that the said insolvent Hormarji Ardesir Hormarji shall be declared entitled to the benefit of the said Act as to the several debts and sums of money due or claimed to be due at the time of making the order vesting the property, estate, and effects of the said insolvent pursuant to the said Act in that behalf in Charles Agnew Turner, Esq., the Official Assignee of this Honourable Court and the Assignee of the estate and effects of the said insolvent, on behalf of several [336] persons named in the schedule as creditors or claimed to be creditors for the sums respectively therein mentioned, and for which such persons gave credit to the said insolvent before the time of making such vesting order, and which were then not payable, and as to the claims of all other persons not known to the said insolvent who may be endorsees or holders of any negotiable security set forth in the schedule of the said insolvent as aforesaid at the expiration of the said three months, except as to the debts due to the said opposing creditors, and that as to such last mentioned debts the insolvent shall be entitled to his discharge so soon as the said insolvent Hormarji Ardesir Hormarji shall have been in custody for the period of twelve calendar months in Her Majesty's Common Jail of Bombay on the Civil Side of the said Jail at the suit of any one or more of the said opposing creditors, the Chartered Mercantile Bank of India, London and China, the Agra Bank, the New Oriental Banking Corporation, the Hongkong and Shanghai Banking Corporation, the National Bank of India, Limited, and the Chartered Mercantile Bank of India, Australia and China, such term of twelve calendar months to commence after expiration of the aforesaid term of imprisonment for three calendar months."

This Court is sitting under the provisions of section 73* of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) which [337] is as follows. (His Lordship read the section and continued):—It is admitted that no similar application to the present has ever been made in this Court, or, so far as has been ascertained, in the High Courts at Calcutta or Madras. It is, therefore, desirable to see what the state of English law was at the time of the passing of the Indian Insolvent Act, 11 and 12 Vic., c. 21, especially as for the power of the Court of the King's Bench to admit persons to bail.

* Section 73 of the Insolvent Act is as follows:—And be it enacted that it shall be lawful for any person who shall think himself aggrieved by any adjudication, order or proceeding of any such Court for the relief of Insolvent Debtors to present, within one calendar month thereafter, a petition to the Supreme Court of Judicature of the Presidency; and it shall be lawful for such Court to order that the whole of the evidence, if any, which shall have been so taken down in writing as aforesaid and the minutes and records of the proceedings, of which complaint shall have been made, shall be brought before it; and the said last mentioned Court shall enquire into the matter of the petition, and of such proceedings and evidence, and shall make such order thereon as to the same Court shall seem meet and just, and shall thereby direct by whom and in what manner the costs of such petition, and of the proceedings which shall have been had thereon, and of the taking down of any such evidence in writing, and of the proceedings of which complaint shall have been made, shall be paid, and such order shall be final and conclusive as to all parties and shall be compulsory and binding upon the Court in which such proceedings so complained of shall have been had.

Now I would premise that it has been held to be a clear principle of English law, that a person charged with a misdemeanour is entitled to be admitted to bail on producing sufficient sureties—*Reg. v. Badger*, 4 Q. B., 468. As to persons convicted, however, the law is different. A man cannot be bailed "if he be convicted by verdict or confession"—*Cemyr's Digest*, Bail, F (2). "It is to be observed that neither this Court (the Court of King's Bench) nor any other Court can bail persons in execution, or punished under any statute with imprisonment for their offence. And this is one reason why they cannot interfere where a party is committed for a contempt"—*Bacon's Abridgment*, Tit. Bail (D.), Vol. I, p. 356; see also *Chitty's Criminal Law*, Vol. I, p. 98. In the well-known case of *John Wilkes*, 2 Burr, 2528, who was tried and convicted on a charge of printing and publishing a seditious and scandalous libel, &c., an attempt was made, pending the hearing of a writ of error lodged by the accused, to have him admitted to bail. The matter came before the Court of King's Bench, and was heard by Lord MANSFIELD, C. J., and YATES, ASTON and WILLES, JJ. It was urged for the prosecution that he was bailable under the provisions of Stat. 4 and 5 W. and M., c. 18. In delivering his judgment on this point, Lord MANSFIELD says (p 2540): "Now whatever doubts there may be about what is within the Act of Parliament of the 4 and 5 W. and M., c. 18, it is most certain that a person convicted of a misdemeanour is not within it; because his case is not a bailable case. Nothing, therefore, can be clearer than that his case is not within an Act of Parliament that relates only to bailable cases." So, too, ASTON, J., (p 2542). This Act "cannot extend to cases of criminal misdemeanour, after conviction; because in such cases a defendant is not entitled to be bailed at all;" and [338] WILLES, J., also says (p 2542) "after actual conviction of a misdemeanour the defendant is not entitled to bail; whether he be or be not outlawed." An application was then made to admit the defendant to bail under the general discretionary power of the Court, but Lord MANSFIELD said he knew of no case in which this had been done. In *Rex v. Brooke and others*, 2 T. R., 190, the defendants were magistrates who had discharged out on bail, pending the decision of their appeal, certain persons who had been convicted by a justice of the peace under the Vagrant Act and committed to the House of Correction. They now appeared, on a rule coming on them, to show cause why information should not be filed against them for misdemeanour in discharging on bail the convicted persons. It was argued by counsel on behalf of the defendants (p. 193) that although no express power was given by the statute, under which the accused persons had been convicted, to bail a person convicted, "yet as he is permitted to appeal to the next sessions, it follows of course that he may be bailed in the meantime, otherwise the appeal is nugatory: for the party may suffer his punishment before the appeal can be heard." On the other side it was stated in argument that "the law is clear that where a man is committed in execution, he is not bailable," and that it made no difference that an appeal was given by the statute. "Though an appeal is given in this case," counsel argued, "the ordinary course of punishment adjudged by the conviction is to take place in the same manner as in case of a judgment in a Court of law upon a criminal proceeding, where the punishment may be inflicted before the writ of error can be determined." In delivering his judgment on the point, ASHURST, J., said, (pp. 194, 195): "If this matter had rested merely on the charge of the defendants having admitted the parties to bail after they had appealed against the convictions, I should have been very unwilling to have granted an information against them on that ground; because as the Act of Parliament gives a summary jurisdiction to a magistrate to convict persons coming within the description of vagrants, and in the same breath gives the party

convicted: a right of appeal from such conviction, a magistrate, not very [339] conversant in the law, might naturally enough have conceived that the meaning of the Legislature was, that the party should not undergo the punishment till the appeal was determined; and, therefore, if the justices had acted *bond fide*, I should have not been inclined on this ground alone to have granted the information." BULLER, J., observed, as to the construction of the Vagrant Act, "that he had no doubt upon the subject, that the commitments of the justice in this case were in execution, consequently the parties could not be bailed, notwithstanding that the statutes had given a right of appeal against the conviction to the next sessions." "It is said," says BULLER, J., "that it is strange that the party should suffer the punishment while the appeal is pending, but we are to consider it like the case put at the bar of a writ of error, which does not suspend the execution of a judgment, which it is brought to reverse." And GROSE, J., was of the same opinion. He says: "I am now clearly of opinion that it is a commitment in execution: but, whether so or not, I am clearly of opinion that the party is not bailable." See also to the same effect *Rex v. Flower*, 8 T. R., 314, *Reg. v. Guttridge*, 9 C. and P., 228; *Reg. v. Scarfe*, 9 Dowl., 553. The last English case I shall refer to is that of *ex parte Hinton*, 2 Deac. and Ch., 407, where it was held that the mere fact of an appeal having been lodged was no ground for staying execution of an order of the Bankruptcy Court.

Such was the state of the law in England when the Indian Insolvency Acts of 1828 and 1848 were passed by the British Parliament. It is perfectly clear that, in England, at that time a person was not entitled to bail after conviction, except at least with the consent of the prosecution. Here the opposing creditors oppose the application, and are perfectly justified in so doing. Mr. JARDINE argued that an insolvent was like a person awaiting his trial, his appeal having been accepted, and pending the final order of the Court of appeal. That argument, however, appears to me to be untenable. The adjudication that has been made is a final adjudication subject only to appeal, if the insolvent thinks it advisable to appeal. In the vast majority of cases that are decided by the Insolvent Court, no appeal is, as a matter of [340] fact, ever filed. Such an appeal is, to use the language of BULLER, J., above quoted, "like a writ of error which does not suspend the execution of a writ of error which it is brought to reverse."

The first Indian Insolvent Act is 9 Geo. IV, c. 73, and sections 3 and 4 of that Act are to the same effect as section 73 of the later Act 11 and 12 Vic., c. 21—the Act now in force. This section 73 has been construed strictly. It has been held that the Commissioner in Insolvency has no power under that section to extend the time for presenting a petition of appeal from an order of the Insolvent Court—*In re Gholam Rasul Khan*, 1 Beng. L. R., (O. C.) 130; nor in the case of an appeal under that section can the High Court impose on the appellant (an opposing creditor) that he shall give security for the costs of such appeal—*In re Ramsebak Misser*, 5 Beng. L. R., 179. In a case decided in Calcutta in 1886 by Sir R. GARTH, C. J., and WILSON, J., it is said: "Orders in insolvency are not orders under the Code of Civil Procedure. They are orders under a special law, but they are under a special law in which different procedure is provided."—*In the matter of R. Brown*, 1 L. R., 12 Cal., at p. 634.

In the Civil Procedure Code (Act XIV of 1882), section 638 enacts that nothing in this code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court. The provisions, therefore, of section 545 of that code, giving the Court power to stay execution in the case of an appeal, have no application to the present case. Indeed it was not contended that they had.

The Criminal Procedure Code (X of 1882) admittedly does not apply to the present application. But that code and the decisions under the previous code (X of 1872) show that where it was intended that sentence was to be suspended pending appeal, and the appellants released on bail, power to release on bail has been expressly given by the Legislature. See section 426 of Act X of 1882, and the corresponding section 281 of Act X of 1872.

[341] Under section 390 of the earlier code (X of 1872) it was held by a Full Bench of the Allahabad High Court—*Queen v. Thakur Parshad*, I. L. R., 1 All., 151,—that the Court of Sessions had no power under that section to admit a convicted person to bail, a convicted person not being an accused person within the meaning of that section. The High Court at Calcutta had previously in three cases arrived at the same conclusions—*Queen v. Mahendranarayan Bangabhusan*, 1 Beng. L. R., (A. C.), 7; *Aradhun Mundul v. Myan Khan Takadgeer*, 24 W. R. (Cr. Rul.) 7; *Queen v. Ram Rutton Mookerjee*, *ibid.*, 8.

For the reasons that I have given I am of opinion that this Court has no power to admit the insolvent to bail; and that assuming it has such power, this is not a case in which, in the exercise of its discretion, this Court ought to allow the insolvent to be bailed until the hearing and final disposal of the appeal.

The application must, therefore, in my opinion, be refused.

Attorneys for the Insolvent: —Messrs. *Chalk, Walker and Smetham*.

Attorneys for the Opposing Creditors: —Messrs. *Craigie, Lynch and Owen*.

[17 Bom. 341]
PRIVY COUNCIL.

The 9th and 10th November, 1892.

PRESENT.

LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND
AND SIR R. COUCH.

Rahimbhoy Habibbhoy.....(Original Defendant) Appellant

versus

Charles Agnew Turner.....(Original Plaintiff) Respondent.

(On appeal from the High Court at Bombay.)

Limitation—Application of Section 18, Act XV, 1877—Knowledge kept from the Official Assignee, (XI and XII Vic., c. 21), of his right to sue for an account of assets fraudulently transferred by an insolvent—Burden of proving when first the plaintiff had clear and definite knowledge—Party for purpose of discovery—Sections 13 and 43, Civ. Pro. Code (XIV of 1882)—Account.

In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts, constituting the fraud, [342] at a time which is too remote for

the suit to be brought. Suggestion of his having been defrauded does not amount to such knowledge as is required by section 18 of the Indian Limitation Act XV of 1877.

In a suit brought by the Official Assignee in 1887 it was established that the defendant receiving in 1869, upon a voluntary transfer, some of the insolvent's assets, joined and assisted him in defrauding his creditors; and that no disclosure of this fraud was made to the Official Assignee, while the defendant did what he could to prevent the latter from seeing the accounts of the assets transferred.

Held, that the burden of proof was on the defendant to show that the plaintiff had clear and definite knowledge of this fraud for more than the period of limitation. This burden had not been discharged by proof of the fact that some hints and clues had reached the Official Assignee which might have led to such knowledge; and *held*, that the Official Assignee had been kept from knowledge of his right to sue, within the meaning of section 18 of the Limitation Act.

Also, this defendant having been "made a party," but only "for the purpose of discovery," to a prior suit brought by the plaintiff, according to an order in that suit, in which, however, there was no decree against him as a party, and no order as to his costs:

Held, that this irregular proceeding had not rendered him a party to that suit so as to make applicable either section 13 or 43 of the Civil Procedure Code (XIV of 1882).

A decree that the defendant should account to the Official Assignee for the assets received by him from the insolvent after the date of the insolvency, was affirmed.

APPEAL by special leave (I. L. R., 15 Bom., 155) from a decree (17th March 1890, I. L. R., 14 Bom., 408) of the Appellate High Court, generally affirming, with a modification, a decree (10th December 1888, I. L. R., 14 Bom., at p. 412) of the Court in the original jurisdiction.

This suit was brought by the Official Assignee on the 25th February 1887, and arose out of the insolvency, in Bombay, of Alladinbhoy Habibbhoy. The adjudication under the Indian Insolvent Act was dated 9th January 1867, and the petition, to which the vesting order related back, 17th December 1866.

The defendant, against whom it was alleged that he had become liable to account to the Official Assignee, was Rahimbhoy Habibbhoy, the insolvent's brother, to whom the property of the insolvent had been transferred, whilst Rahimbhoy was carrying on business with another brother, Ahmedbhoy, with whom he remained partner in Bombay trading under the name [343] of Ahmedbhoy Habibbhoy until August 1869. These two brothers also had a branch firm styled Rahimbhoy Habibbhoy carrying on business in Hong-kong, where also the insolvent, Alladinbhoy, had a firm as well as in Bombay.

The property, of which fraudulent possession was attributed to the defendant, was in six classes as set forth in the plaint and in the judgments of the Courts below (I. L. R., 14 Bom., at pp. 411 and 422).

As to three of these classes of property the suit in the original jurisdiction was dismissed. As to the remaining three an account was decreed of the dealings between the defendant's firm and the insolvent. On appeal, the High Court affirmed this decree with a variation of detail, but decided against the plaintiff as to one of the three classes that had been allowed in the first instance, and as to the other two classes restricted the account decreed, so that it should only commence with the assets received by the defendant after the date of the insolvency. No appeal was preferred by the Official Assignee. This appeal was, accordingly, limited to the transfer of the two classes of property, which were referred to as the China property and the Elphinstone shares. It involved the main question whether the transfer was not only voluntary and invalid against the creditors of 1866, but was a fraud which prevented the Official Assignee from having the knowledge of his right to

recover the assets during the intervening years so as to bring into operation the saving effect of section 18 of the Limitation Act. The question whether a decree made against Ahmedbhoy in 1882 had barred the claim was also considered ; as well as whether modifications in the taking of the account made by the Appellate Court were correct.

In 1881 the Official Assignee sued Ahmedbhoy. In that suit an order was made for the present defendant Rahimbhoy to be made a party "for the purpose only of discovery." No relief was in that suit sought against Rahimbhoy, nor was any decree made against him. But there was a decree, after a reference to arbitration, made against Ahmedbhoy for Rs. 3,60,000 in connection with transactions with the insolvent's estate. In December 1885, in the course of that suit, an order for the inspection of the account books then in Rahimbhoy's, (the present defendant's,) possession was obtained. This led to further discoveries, and this suit was, in consequence, filed.

The facts are stated at length in the report in I. L. R., 15 Bom., p. 155. They are given in the judgments of the Courts below ; and they also appear in their Lordships' judgment on this appeal.

The High Court concurring with the first Court found that as to the China property the evidence established a fraudulent transaction as regarded the creditors on the part of the China and Bombay firms of Rahimbhoy and Ahmedbhoy in complicity with the insolvent himself. Also, as to the Elphinstone shares, the Courts found that the conduct of the three brothers in 1866 left no doubt that although the transfer was, for value it was effected in furtherance of the general scheme for delaying and defeating creditors. As regarded limitation, both Courts treated the period as three years from the time of the adjudication in January 1867. But they held that limitation did not apply where, as here, the plaintiff had by means of fraud been kept from the knowledge of his right to sue. The foundation for this was the conclusion at which the Courts had arrived that there was designed fraud in the transaction by which the defendant, knowing to whom the rights belonged, concealed the circumstances giving those rights, until the Official Assignee obtained inspection of the China books in December 1885.

As to the suit brought in 1881, the present defendant was not, according to the opinion of the first Court, then made such a defendant as that a substantial decree could have been passed against him. It was not in that suit asserted that the Elphinstone shares were claimed at all. The first Court also found as a fact that the claim originally made in 1881 in respect of part of the China assets was not taken into consideration by the arbitrator in determining the amount which he awarded to the Official Assignee. Lastly, the terms in which the accounts were directed appear in the judgments of the Courts below (I. L. R., 14 Bom., pp. 411 and 422).

[345] Mr. A. Cohen, Q. C., and Mr. J. H. A. Branson, for the Appellant, argued that the claims of the plaintiff both in respect of the China assets and the Elphinstone shares should have been held barred by limitation the Courts below having erred in applying the saving provisions of section 18 of the Limitation Act to this suit. The proceedings in 1881 showed that the Official Assignee before 1885 possessed at least, the means of obtaining knowledge of the circumstances, and the means of ascertaining the particulars. It was upon his knowledge that he took those proceedings. Further evidence was afforded, to which reference was made in the record, upon which, as it was contended, the Official Assignee might have, but had not, acted against the present defendant. The Courts below should have found upon the facts that it was not proved that the plaintiff had by means of fraud, on the part of the defendant, been

kept from the knowledge of his right, such "keeping from knowledge" being an essential part of the case. It was not sufficient that an invalid, or fraudulent, preference, on the part of the insolvent, should have been shown, or even that Rahimbhoy assisted him, for nothing less than continuance in concealing of the real state of things by the defendant would satisfy the requirement of section 18. In regard to having the means of knowledge, reference was made to *Barnes v. Addy*, L. R., 9 Ch., 244. It was also contended that the Courts below ought to have held that the judgment obtained against Ahmedbhoy in 1882, barred this suit, the prior suit having been based on allegations of a collusive and fraudulent transfer of the property of which an account was decreed. This defence was maintainable either under section 13 of the Civil Procedure Code (XIV of 1882) in one view of the case, or in another, under section 43, as the two classes of property now in dispute, if to be the subject of an account, might have been included in the prior suit.

Mr. R. B. Finlay, Q.C., and Mr. J. D. Mayne, for the Respondent, were heard only as to the variation in the mode of taking the account.

Mr. A. Cohen, Q. C., replied on this last matter.

[346] At the end of the arguments of counsel their Lordships' judgment was given by

Lord Hobhouse:—This suit is brought by the Assignee of Alladinbhoy, who became insolvent in the year 1867, against the appellant, to recover assets alleged to belong to the insolvent's estate, of which the appellant had wrongfully become possessed.

The dispute is now narrowed down to two items, one being what is called the China assets, and the other, certain shares in a joint stock company called the Elphinstone Land Company.

There is no need to make a long story about the facts, of which very few are in dispute. The only peculiarity in the case is the length of time that elapsed between the insolvency and the bringing of the action. Their Lordships entirely accept the view which both the Courts below have taken, that the insolvent, his son, and his two brothers, Ahmedbhoy and the present appellant Rahimbhoy, combined together to conceal the property of the insolvent with the view of defrauding his creditors.

The first item which is in dispute, namely, the China assets, is of the following kind. The insolvent had a business at Hongkong, and his brothers Ahmedbhoy and Rahimbhoy also carried on business at the same place in partnership. By the middle of 1866 the insolvent was in very embarrassed circumstances. In September 1866, he absconded so as to conceal himself from his creditors. His petition in insolvency was presented on the 17th of December 1866, and he was adjudicated insolvent on the 7th of January 1867. Pending these transactions, that is to say on the 1st of January 1867, between the date of the petition and the date of the adjudication, the whole of the insolvent's assets at Hongkong were handed over by his manager to the firm of his brothers Ahmedbhoy and Rahimbhoy, and his books were also handed over. It is not disputed that the transfer was a voluntary one: that it cannot be maintained, and that if this action had been brought in 1867 the assets must have been recovered. But it is said that as the action was not brought till 1887, it is barred by time. The answer is that the transfer was not only a voluntary one and bad against the creditors, but that it was committed in pursuance of a fraud, and was concealed from the [347] creditors: that it was a fraud which prevented the Assignee from having knowledge of his right to recover the assets, and, therefore, falls within the 18th section of the Limitation Act XV of 1877, which directs that in such a case the time for

instituting an action shall be computed from the time when the fraud first became known to the person injuriously affected thereby.

The Assignee is positive that he did not know anything about this fraud until the year 1885, when he learnt it in the course of a suit brought against Ahmedbhoj to recover a number of other items, in conjunction with this one, belonging to the insolvent's estate.

Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit. That is attempted in the present case. But their Lordships consider,—and in this they agree with both the Courts below—that all that the appellant Rahimbhoj has done is to show that some clues and hints reached the Assignee in the year 1881, which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, but that there was no disclosure made which informed the mind of the Assignee that the insolvent's estate had been defrauded by Rahimbhoj of these assets in the year 1867.

Reference is made to a letter showing the transfer of the assets at that time, to an affidavit of documents which in themselves contain hints as to the conduct of the parties, and to certain memoranda called "the stitched book," which was kept by a treacherous servant of Ahmedbhoj, which again give hints and clues which might have led to knowledge. But all this while the appellant was doing what he could to keep back the books of the insolvent firm which he had got into his hands, and to prevent the Assignee from seeing accounts which he desired to see. Their Lordships cannot consider that this is such knowledge on the part of the Assignee as would deprive him of the benefit of the 18th section of the Limitation Act. They, therefore, con-[348] sider that the action is brought in good time, being brought within two years after the real knowledge came to the mind of the Assignee.

Then it is said that the suit against Ahmedbhoj is itself a bar to the present suit, because Rahimbhoj was made a party to it. There seems to have been a very irregular proceeding in that suit. Rahimbhoj was made a party expressly, as the order termed it, for the purpose of discovery only, but he was not treated as a party. There was no decree against him: he was dispensed from attendance unless and until the plaintiff gave him notice; and the Court has never made any order about his costs.

Their Lordships consider that the Courts below took a right view when they held that Rahimbhoj must not be considered a party to that suit, so as to be bound or protected by a decree made in it.

It is further urged that this item has in fact been recovered from Ahmedbhoj. It should have been mentioned that Ahmedbhoj and Rahimbhoj dissolved partnership in the year 1871, and they have since that time been severed in interest. No doubt there was the suit against Ahmedbhoj, which has been already mentioned, and the item was claimed against him in that suit. But the suit resulted in a reference to an arbitrator, and it was agreed between the parties when they came before the arbitrator that this particular item should not be pressed. It was in effect withdrawn from the arbitrator, and as the decree only follows the arbitrator's award, that item must be considered as excluded from the suit.

Their Lordships consider that there is nothing now to prevent the Assignee making his claim against the appellant Rahimbhoj, who is the other party to the fraud.

An objection was made by counsel for Rahimbhoy to a variation of the decree made by the first Court. The first Court directed a general account of the dealings between Rahimbhoy's firm and the insolvent. The Appellate Court limited that account, by directing that it should only commence with the [349] assets received after the date of the insolvency. Their Lordships consider that the Appellate Court have gone upon a right principle, and they decline to vary the decree in that respect.

The remaining item is that which has reference to the Elphinstone shares. As regards the question of fraud, this item stands in precisely the same position as that which relates to the China assets, and their Lordships come to the same conclusion upon it.

The appellant, however, complains of a variation made in the decree of the first Court by the Appellate Court, by which it is directed that in taking an account of these shares two sums for which credit is claimed by the appellant shall be disallowed to him. The matter stands in this way. The shares belonged to Alladinbhoy. He mortgaged them to the Imperial Bank of Bombay. On the 15th of May 1866, the firm of Ahmedbhoy and Rahimbhoy paid off the sum then due upon the mortgage of the shares, namely, Rs. 68,838-4, and they subsequently paid a call upon the shares of Rs. 22,785-8. When the reference was before the arbitrator in the suit against Ahmedbhoy, Ahmedbhoy claimed to be allowed those two sums. The Appellate Court thought that inasmuch as that matter was before the arbitrator it must be taken as certain that he allowed those two sums, or allowed value for them, and made his award against Ahmedbhoy upon that footing. It does not seem to their Lordships that this is by any means certain. It appears that there was an agreement made between Ahmedbhoy and Rahimbhoy in the year 1871, by which a sum of Rs. 1,17,520, which under a previous award belonged to Rahimbhoy, was transferred by him to Ahmedbhoy and became Ahmedbhoy's property. There were several other items surrendered by Rahimbhoy to Ahmedbhoy, and Rahimbhoy took all the residue of the property of the partnership. That was the effect of the agreement of 1871. The Appellate Court have considered that the two sums of Rs. 68,838-4 and Rs. 22,785-8, claimed in the reference in Ahmedbhoy's suit, were portions of the Rs. 1,17,520 which was assigned by Rahimbhoy to Ahmedbhoy, and they have directed that, so far as those sums form a portion of the Rs. 1,17,520, they shall be disallowed in taking the account.

[350] Their Lordships are not at all prepared to say that it may not turn out as the Appellate Court anticipate; but they do not consider that there is evidence enough before them to warrant them in assuming any such thing. It may be that there is no identity between the two sums. It may be that the arbitrator finding that the two sums were a charge upon certain shares which were not embraced in the suit against Ahmedbhoy, threw out the whole matter. Their Lordships cannot tell what circumstances may be brought out in the inquiry. Upon the general account directed by the first Court, the whole facts will be ascertained; and then it will be competent for the Court to make a decree to meet the exact justice of the case.

Their Lordships think it, therefore, more prudent at the present stage of the case to make no direction as to those sums. What they say now is not intended to prejudice the question in any way. They merely think that it is right to suspend the judgment until the facts are accurately ascertained.

It should be observed that this matter is not mentioned in the pleadings. If it were the case that the two sums were taken into account by the arbitrator, and the shares thereby liberated from the charge, it would have been more natural to have disclosed that fact in the pleadings, in order that it might be

sifted and elucidated in the course of the evidence and the hearing. But that has not been done, and, therefore, there is a certain amount of obscurity and darkness hanging over the point, which makes their Lordships desirous that the account should be taken in the general form settled by the first Court.

The result is that the decree of the Appellate Court will be varied, by omitting therefrom the direction that the defendant is not to be allowed credit for the sums of Rs. 68,838-4 and Rs. 22,785-8 so far as the said two sums are included in the sum of Rs. 1,17,520, and affirmed in all other respects.

With regard to the costs of the appeal, their Lordships think that the variation now made ought to make no difference. Though it may prove to be a point of importance, the appeal was presented, not on this ground, but on the much broader and [351] more vital grounds which have been dealt with and decided adversely to the appellant.

Their Lordships think, therefore, that substantially this appeal has failed, and that the appellant must bear the costs.

Solicitors for the Appellant:—Messrs. *Latley and Hart*.

Solicitors for the Respondent:—Messrs. *Payne and Latley*.

NOTES.

[The onus is on the defendant to show that the plaintiff's suit was too remote by reason of previous knowledge:—(1905) 27 All., 540; (1907) 31 Mad., 230, (1910) 15 C. W. N., 102; (1906) 2 N. L. R., 98; (1910) 9 M. L. T., 303; (1914) 20 C. L. J., 341 at 347; (1913) 14 Bom. L. R., 771; (1912) 16 I. C., 464 (Cal).]

[17 Bom. 351]

ORIGINAL CIVIL.

The 25th November, 1892.

PRESENT:

MR. JUSTICE STARLING.

Morarji Cullianji.....Plaintiff

versus

Nenhai and othersDefendants.*

Will—Construction—Charity—Bequest to charity—Sadavarat—Bequest to a definite sadavarat—Bequest to two charitable objects, one of such bequests being invalid—Bequest of interest of a fund to A with invalid gift over of interest after A's death—A takes corpus of fund.

Where a testator by his will directed certain rents to be used "for sadavarat," and where from the wording of the will it appeared that the testator intended his executors to establish a definite sadavarat in some definite place, and not merely, at their discretion, themselves to distribute the income of the property at any indefinite place, and perhaps at many places, to Brahmins and travellers,

Held, that the bequest to charity was good, and an enquiry was directed as to the place at which such sadavarat should, at the proper time, be established, and a scheme for its administration was ordered to be prepared.

A testator by his will directed that, if his daughters died without issue, the property of his daughters should be used by his executors for dhurm and for sadavarat.

* Suit, No. 96 of 1891.

Held, following *Hoare v. Osborne*, L. R., 1 Eq., 55, that the bequest was good to the extent of one-half in favour of the *sadavarat*. The gift to *dhurm* being invalid, the other half was undisposed of.

A testator by his will directed that his wife should enjoy for life the interest of Rs. 4,000 which were deposited with a certain firm, and that after her death the interest should be given to *dhurm*. There was no residuary clause in the will.

Held, that the gift to *dhurm* being clearly bad and there being no residuary clause in the will, the corpus of the Rs. 4,000 was undisposed of, and went to the testator's widow.

[352] SUIT by an executor for the construction of a will and for administration, &c.

Jetha Pudumsey, the testator, died in 1875, having made his will, dated 24th August 1875, which was duly proved in 1878.

The following are the clauses of the will which the plaintiff prayed to have construed :—

"After the decease of my wife shall have taken place, my executors shall use for *sadavarat* (purposes) the rent of the above-mentioned house No. 7 situated in Dariasthan Lane. And should they deem it proper, they may sell off the same and realize interest (on the proceeds) and duly pay over (the interest) into the *sadavarat*. And there are two houses belonging to me, situated at Mody Bazar. Out of the rent of the said houses and the interest which may be realized in respect of my moneys in ready cash, whatever the same may be, my executors shall use Rs. 50 (namely, fifty) per mensem for *sadavarat* (purposes), and they shall pay Government (and) assessment bills and shall get repairs made."

"As regards the two houses situated at Mody Bazar and as regards the money, whatever the same may be, should there be no issue of the womb of my daughters, the same (i.e.) the property of (my) daughters shall be used by my executors for religious and charitable purposes (*dhurm*) and for *sadavarat* (purposes). Further, Rs. 4,000, (four thousand), are credited to the name of my wife, Nenbai, at Thakor Dungar Gangji's place. My wife during her lifetime shall enjoy the interest of those rupees. After the decease of my wife, religious and charitable donations (*dhurm*) shall be made (given) out of the interest of those rupees."

"And as regards the above-mentioned Rs. 50 fixed for the *sadavarat* the same are to be paid at Shri Narayan Saraoji."

The testator's two daughters (Mulbai and Nenbai) survived him, but had died without issue before the date of this suit.

The first defendant was the testator's widow. The second and third defendants were co-executors with the plaintiff, and the fourth defendant was the husband of the testator's daughter [353] (Nenbai). The last mentioned defendant, as heir of his wife, claimed the share of the residue to which he alleged she was entitled if the gifts to charity were held to be void.

The Advocate-General was a party defendant.

Lang (Acting Advocate General) and *Inverarity*, for Plaintiff :—They cited *Jamnabai v. Khimji Vullubdass*, 1 L. R., 14 Bom., 1; *Tudor on Charitable Trusts*, (3rd Ed.), pp. 29, 279; *Dawson v. Small*, L. R., 18 Eq., 114; *In re Birkett*, 9 Ch. D., 576; *Theobald on Wills*, (3rd Ed.), p. 378, para. 3.

Jardine and Anderson for Defendants Nos. 1, 2 and 3. They cited *Tudor on Charitable Trusts*, (3rd Ed.), p. 38; *Theobald on Wills*, (3rd Ed.), p. 378.

Starling, J.:—In this suit there are three points to be determined : (1) whether the gift to "*sadavarat*" of the income of the house in Dariasthan

on the death of the testator's wife is valid? (2) whether the gift to the "*dhurm*" (i.e., religion) and "*sadavarat*" (i.e., charity) of the residue of the income of the two houses at Mody Bazar, after the death of the testator's two daughters, is valid? (3) whether the gift to "*dhurm*" of the Rs. 4,000, on deposit with Dunji Gangji, is valid, and if not, whether the provisions regarding the two houses could apply to it, or whether it would be undisposed of residue?

With regard to the first question, the words of the will are: "After the decease of my wife shall have taken place, my executors shall use for '*sadavarat*' the rent of the above-mentioned house." Power is then given to sell the house, and invest the proceeds, and pay the income "into the '*sadavarat*.'" Looking to the wording of the will, I am of opinion that the testator intended his executors, after the death of his wife, to establish a definite "*sadavarat*" in some definite place with the income of that house, and not merely, at their discretion, themselves to distribute the income at any indefinite place, and perhaps at many places to Brahmins and travellers. I, therefore, hold that this is a good charity, and there must, therefore, be an inquiry as to the place at which such "*sadavarat*" should at the proper time be [354] established, and a scheme must be prepared for its administration.

As to the second question, the wording of the will is different. It provides that, if the testator's daughters die without issue, "the property of my daughters shall be used by my executors for '*dhurm*' and '*sadavarat*.'" The gift to "*dhurm*" is invalid; consequently it becomes necessary to determine, whether one portion of the gift, the extent of which is uncertain being invalid, the whole is invalid; or whether the valid portion takes a share or the whole of the gift. Under earlier authorities the whole gift would be held to be invalid, but later decisions have gone on the principle that, if possible, the valid portion should be upheld. I shall follow the later cases, and it will, therefore, be necessary to decide whether the whole or a portion is to go to the "*sadavarat*." Mr. Inverarity argued that the whole should go, on the authority of *Dawson v. Small*, L. R., 18 Eq., 114, and *In re Birkett*, 9 Ch. D., 576. There are several other cases of a similar nature—*Hoare v. Osborne*, L. R., 1 Eq., 585; *Fisk v. Attorney-General*, L. R., 4 Eq., 521; *Hunter v. Bullock*, L. R., 14 Eq., 45; *In re Williams*, 5 Ch. D., 735, and *Vaughan v. Thomas*, 33 Ch. D., 187. In *Fisk v. Attorney-General*, *Hunter v. Bullock* and *In re Birkett*, the gift was to a person other than the testator's executors or trustees, and the principle which seems to me to run through these cases is that a definite gift being made to "a particular person," with a trust for an invalid purpose attached to it, and a trust for the balance for a valid purpose, and not merely directions given to the testator's executors or trustees to act in a certain manner, the Court will not deprive the donee of the amount set apart for the trust, which he need not perform, but will let it fall into the balance which is applicable to the valid purpose. This view, I know, is dissented from by MALINS, V. C., in *In re Williams*, 5 Ch. D., 735. In *Dawson v. Small*, L. R., 18 Eq., 114, and in *In re Williams*, 5 Ch. D., 735, it was the executors who were to carry out the wishes of the testator, and the Court held that the whole of the income should be applied to the valid trusts. In *Hoare v. Osborne*, L. R., 1 Eq., 585, and *Vaughan v. Thomas*, 33 Ch. D., 187, the Court, on the contrary, held that the value of the invalid trust went into the residue, adopting in each case a different [355] method of ascertaining what was to be apportioned to the valid and the invalid trusts respectively.

Thus, of the cases which seem to me to be nearly on all fours with the present, there are two deciding one way and two the other, and three others the principle of the decision in which can, I think, be distinguished from these four. In the present case, however, the directions are much more vague than in any of the foregoing seven cases, and I should have held that the whole gift

to "*dharm*" and "*sadavarat*" was invalid if it had not been for the modern tendency to uphold as much as possible where charity is concerned. I shall, therefore, follow the case of *Hoare v. Osborne*, L. R., 1 Eq., 585, and hold that the gift of the rent of the two houses and the income of money in ready cash is good to the extent of one-half in favour of the "*sadavarat*", and there must be an inquiry as to where the "*sadavarat*" is to be established, and a scheme framed for its administration; and there should also be a report as to whether the "*sadavarat*" to be established out of the income of the house in Dariasthan should be entirely separate from this one, or whether the income of the other property, when it falls in, should be added to this. The other half of these two properties and of ready cash will thus be undisposed of, and will go to the first defendant for a widow's estate.

The only question now to be disposed of is that regarding the Rs. 4,000. The gift to "*dhurm*" is clearly bad, and I do not think that a deposit of moneys with a firm at interest would come under the term "money in ready cash," which seems to me a more restricted term than "money" or "ready money." There is no residuary clause in the will, and there are no other words than "money in ready cash" which occur in connection with the bequest of the houses of Mody Bazar, by which it can be held that this Rs. 4,000, in the events which have happened, are subject to the same trusts, consequently I hold that the "*corpus*" of the Rs. 4,000 being undisposed of, it will go to the widow. She was, therefore, entitled to remove it from the place where it had been deposited by the testator.

Declare that the defendant Nembai is entitled to the possess-[356]ion of the house in Dariasthan and to recover the rents and profits thereof, applying them as directed by the will of the testator. Declare that the gift of the rent of the house in Dariasthan, in the plaint mentioned, after the death of the testator's wife is valid, and that the same be and is hereby established. Refer to the Commissioner to report whether the same should be separated from the other "*sadavarat*" hereinafter referred to, and if necessary to inquire and report where the same should be established, and to prepare a scheme for the administration thereof. Declare that the trusts declared as to the income of the two houses in Mody Bazar, and of the interest which may be realized in respect of the testator's moneys in ready cash, is invalid so far as regards "*dhurm*," but valid to the extent of one-half of such income and interest in favour of the "*sadavarat*." Refer to the Commissioner to enquire and report where the same should be established, and to prepare a scheme for the administration thereof. Declare that the directions to expend the sum of Rs. 4,000, in the will mentioned, by "*dhurm*," are invalid, and that the said sum is undisposed of by the said will, and belongs to the defendant Nembai as widow of the testator. Refer to the Commissioner to take an account of the property of the testator received or taken possession of by the executors, or any and which of them, and of their application thereof, &c. Fourth defendant to pay his own costs. Costs of all other parties, as between attorney and client, to be paid out of the estate.

Attorneys for the Plaintiff:—Messrs. *Little, Smith, Nicholson and Bowen*.

Attorneys for the Defendants:—Messrs. *Payne, Gilbert and Sayani*.

NOTES.

- [1. A bequest to *sadavarat* is valid:—(1908) 12 C.W.N., 1083; (1909) 3 S.L.R., 185.
2. A bequest to *dharm* is invalid:—(1904) 31 Cal., 895; (1899) 23 Bom., 723; (1907) 30 Mad., 340.
3. In the absence of a residuary clause, a bequest that fails goes to the heir of the testator:—(1897) 21 Bom., 646; (1913) 25 M.L.J., 556.]

[357] APPELLATE CIVIL.

The 19th April, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Nandram Daluram..... (Original Defendant) Appellant

versus

Nemchand Jadavechand..... (Original Plaintiff) Respondent.*

Arbitration—Award—Decree in terms of award—Appeal—Award by three out of four arbitrators—Illegal award.

Where a decree has been passed in terms of an award, an appeal lies only where the question is whether the award was illegal, being void *ab initio*.

SECOND APPEAL from the decision of Rao Bahadur Chunilal, Maneklal, First Class Subordinate Judge of Ahmedabad with Appellate Powers.

Suit (No. 348 of 1886) and cross suit (No. 389 of 1886) for account. On the application of the parties both suits were referred to the arbitration of four arbitrators. In January 1888, one of the arbitrators resigned, and another was by consent appointed in his place. . . .

In April 1888, the last mentioned arbitrator ceased to take part in the proceedings, and on the 12th July 1888, the other three arbitrators gave their decision, two of them publishing one award, and the third, differing from his colleagues, publishing a separate award.

The plaintiff, Nandram, objected to both the awards, and contended (*inter alia*) that they were illegal, not being the award of the four arbitrators who had been appointed.

The Subordinate Judge held that the award of the two arbitrators, being that of the majority, should be filed, and he made a decree in terms of that award.

Against that decree Nandram (plaintiff in Suit No. 348 of 1886) appealed, and the Appellate Court confirmed the order, observing: "On a consideration of the authorities cited on either side, the tendency appears to allow an appeal only in a case in which there is no award either in fact or in law, but not to allow an appeal in any other case, and the determination of the question raised on behalf of the respondent [358] depends upon the question whether the disputed award is a mere nullity, and this latter question must be answered in the negative. The award is assailed on the grounds that the arbitrators, who decided against the plaintiff (Nandram), accepted bribes from the other side; that the parties had appointed four arbitrators, but the fourth arbitrator has not made an award and has been absent at Rutlam; that Chunilal was appointed, not an arbitrator, but an umpire; that the two arbitrators, who have decided against the plaintiff, had once submitted their award which the Court remitted for amendment, and those arbitrators fraudulently destroyed that award and made a new award, that the arbitrators have allowed time-barred items; that the amount due is illegal and faulty; that the Court had no jurisdiction, as the amount on the credit and debit sides of the accounts exceeded Rs. 5,000.

* Second Appeal, No. 635 of 1890.

"Such are the grounds urged by the appellant against the award, but they are neither singly, nor as a whole, sufficient to make the award a nullity. For the purpose of the preliminary objection raised on behalf of the respondent, the distinction between void and voidable awards should be borne in mind, and although the grounds urged by the appellant might be sufficient to hold that the award is voidable, still they cannot possibly be held as making the award void *ab initio*. I, therefore, hold that no appeal lies against the decree of the Court below."

Nandram appealed to the High Court.

Rao Saheb Vasudeo Jagannath Kirtikar (Government Pleader) for the Appellant:—Where a decree is based upon an award, and the legality of the award is impugned, an appeal lies against the decree. An award, in which all the arbitrators have not joined, is not legal. The lower Courts were wrong in holding that the objections raised against the award do not render it illegal and, therefore, void *ab initio*. The Full Bench ruling of the Allahabad High Court in *Lachman Das v. Brijpal*, I. L. R., 6 All., 174, is in point. See, also, *Muhammad Abd v. Muhammad Asghar*, I. L. R., 8 All., 61; *Dagdusa Tulukchand v. Bhukan Govind Shet*, I. L. R., 9 Bom., 82; *Debendra Nath Shaw v. Aubhoy Churn* [359] *Bagchi*, I. L. R., 9 Cal., 905; *Samal Nathu v. Jaishankar Dalsukram*, I. L. R., 9 Bom., 254; *Suppu v. Govindachariyar*, I. L. R., 11 Mad., 85; *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee, &c.*, 8 Beng. L. R., 315.

L. M. Wadia (with Gangaram B. Kelle) for the Respondent:—The lower Court has, no doubt, not found directly that the award is good in law, but it is clear from the judgment that the Court was of opinion that the award is legal. The award being legal, no appeal can lie against a decree based upon it. We rely upon *Vishnu Bhan Joshi v. Ranji Bhan Joshi*, I. L. R., 3 Bom., 18; *Naurang Singh v. Sadapat Singh*, I. L. R., 10 All., 8; *Chagirth v. Ram Ghulam*, I. L. R., 4 All., 283; *Ramonoogra Chobay v. Mussamat Putmoota Chobayan*, 7 W. R., 205 Civ. Rul.; *Sreenath Ghose v. Raj Chunder Paul*, 8 W. R., 171 Civ. Rul.; *Shaikh Elahce Buksh v. Shaik Hajoo*, 11 W. R., 33 Civ. Rul.; *Lalla Ishwer Pershad v. Hur Bhanjun Tewaree*; and *Sustee Churn Chuckerbutty v. Tarak Chunder Chatterjee*, 15 W. R., 9 (Full Bench); *Sreenath Chatterjee v. Kylash Chunder Chatterjee*, 21 W. R., 248 Civ. Rul.; *Maharajah Joymunqu Singh Bahadur v. Mohun Ram Marwaree*, 23 W. R., 429 Civ. Rul.; *Protap Chunder Roodro v. Huro Monee Dossia*, 24 W. R., 188 Civ. Rul.

Sargent, C. J. :—In this case, the matters in dispute between the parties in two suits Nos. 389 of 1886 and 348 of 1886 were referred to arbitration. On the application to file the award numerous objections were taken, which were, however, disallowed by the Court, and a decree was finally passed in the terms of the award. The plaintiff in Suit No. 348 of 1886 then appealed against the decree; and the Court below has dismissed the appeal on the ground that no appeal lay against the decree. The reasons for this decision are to be found in the judgment of the Lower Appeal Court in the appeal (No. 68 of 1889) from the decision in Suit No. 348 of 1886, where the Subordinate Judge with appellate powers after referring to the authorities held that an appeal would lie where the award was a nullity, not where it was only voidable.

[360] The earlier cases turn upon section 325 of the Civil Procedure Code of 1859, which says that when judgment shall be given according to the award, the judgment shall be final. In *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* and *Lala Iswari Prasad v. Bir Bhanjan Tewari*, 8 Beng. L. R., 315, the Calcutta Full Bench (dissentiente PAUL, J.) answered the question "When an award has been ordered to be filed, and judgment has been given in accordance with it under section 327, Act VIII of 1859, is such judgment open to appeal?"

by saying that "it was open to an appellant to show that the paper which has been filed is not an award." In *Maharajah Joymungul Singh Bahadoor v. Mohun Ram Marwaree*, 23 W. R., 429 Civ. Rul.; where the question came before the Privy Council, there had been an arbitration in the course of a suit under the same Act, and the decree passed in the terms of the award had been set aside on appeal by the High Court on the ground that the award had not been signed by the arbitrators separately, and that ten days had not been allowed for objections, and the case was remanded (with remarks on the objections generally as a guide to the Court below) to have these defects remedied, and the several objections heard. On remand, the award was properly signed, and the objections were duly heard after proper notice and adjudicated on;—one of which was that the arbitrators had been guilty of misconduct in conducting the arbitration "so as to vitiate the award." The High Court, on appeal to it, held that no appeal would lie from the decree in the terms of that award, and the Privy Council, on appeal from that decision, held that the High Court was right—1st, in reversing the first decree and remanding the case, and, 2ndly, in holding that there was no appeal from the decree passed on remand.

In *Debendra Nath Shaw v. Aubhoy Churn Bagchi*, 1 L. R., 9 Cal., 905, Sir RICHARD GARTH, Chief Justice, after expressing some doubt, concluded, on the authority of the Full Bench decision in *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee*, *Lala Iswari Prasad v. Bir Bhanjan Tewari*, 8 Beng. L. R., 315, that an appeal would lie where the question is whether there is a legal award, which he held was raised [361] in that case by the objection that the award had been signed only by three of the arbitrators. In *Luchman Das v. Brijpal*, 1 L. R., 6 All., 174, where the question arose under section 522 of Act X of 1877, the Court, after referring to the decision of the Privy Council in *Maharajah Joymungul Singh Bahadoor v. Mohun Ram Marwaree*, 23 W. R., 429 Civ. Rul., held that an appeal would lie where "there was in fact or in law no award." It is not clear from the judgments delivered in this case whether by the expression "in law no award" the Court meant not only an award which has no legal effect *ab initio*, but also one which is voidable under section 522. The Madras Court in *Suppu v. Govindacharyar*, 1 L. R., 11 Mad., 85, would appear to place the larger meaning on the term "in law no award." In *Debendra Nath Shaw v. Aubhoy Churn Bagchi*, 1 L. R., 9 Cal., 905, it is to be observed that the objection taken to the award was that the three arbitrators who signed it could not, under the circumstances, make an award; in other words, that there was no award made, having legal effect *ab initio*; and it appears to us that the judgment of the Privy Council in *Maharajah Joymungul Singh Bahadoor v. Mohun Ram Marwaree*, 23 W. R., 429 Civ. Rul., is irreconcilable with any other view than that it is only where the award is not a legal award in the above sense that the appeal will lie.

In the present case, one of the objections taken by the appellant is that the decision by three of the arbitrators, when four were appointed, is illegal; and, if established, it would render the award illegal *ab initio*. We must, therefore, remand the case for a decision on that issue.

Case remanded.

NOTES

[This was followed in (1897) 24 Cal., 469; (1906) 2 N.L.R., 81; see also (1904) 29 Bom., 285; (1896) 18 All., 422; (1895) 18 Mad., 423.]

[362] APPELLATE CIVIL.

The 22nd April, 1892.

PRESENT.

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Chandra Naik.....Applicant

versus

Bahinabai and another.....Opponents.*

Watandars Act (Bombay Act III of 1874), Sec. 10†—Certificate issued by Collector more than twelve years after death of last holder—Court bound to act on certificate—Limitation—Limitation Act (XV of 1877), Art. 178.

In execution of a decree against Nijaling Naik his lands were sold in February 1876, and Hanmantbhatt purchased them and took possession on 10th August 1876. Nijaling Naik died in July 1877, and in February 1888, his son and heir alleging that the lands were *watan* applied to the Collector for a certificate under section 10 of the Watandars Act (Bombay III of 1874). The Collector referred the matter to his subordinates for inquiry, and the certificate was not issued until the 13th March 1890,—that is, more than twelve years after the death of the last holder, Nijaling Naik.

Held, that, although more than twelve years had elapsed, the Court could not refuse to act on the certificate of the Collector, as provided by section 10 of the Watandars Act.

THIS was a reference made by Rao Sahib Raghavendrarao Ramchandra Gangohi, Subordinate Judge of Bagalkot, under section 617 of the Civil Procedure Code (Act XIV of 1882).

[363] On the 18th February 1876, certain lands were sold in execution of a decree dated the 29th August 1874, passed by the Subordinate Judge of Bagalkot against one Nijaling Naik in Suit No. 797 of 1874. At the Court sale the lands were purchased by Hanmantbhatt bin Bhimabhatt, who took possession of them on the 10th August 1876.

Nijaling Naik died on the 4th July 1877, leaving behind him his son and heir, Chandra Naik. On the 19th February 1884, Chandra Naik applied to the Collector of Bijapur for a certificate under section 10 of the Hereditary Offices Act, otherwise called the Watan Act (Bombay Act III of 1874). The Collector having referred the matter to his subordinates for inquiry and report, issued the

* Civil Reference No. 10 of 1891.

† Section 10 of the Watandars Act (Bombay Act III of 1874):—When it shall appear to the Collector that by virtue of, or in execution of, a decree or order of any British Court any *watan* or any part thereof, or any profits thereof, recorded as such in the revenue-records or registered under this Act, and assigned under section 23 of this Act as remuneration of an officiator, has or have after the date of this Act coming into force, passed or may pass without the sanction of Government into the ownership or beneficial possession of any person other than the officiator for the time being; or that any such *watan* or any part thereof, or any of the profits thereof, not so assigned has or have passed or may pass into the ownership or beneficial possession of any person not a *watandar* of the same *watan*, the Court shall, on receipt of a certificate under the hand and seal of the Collector, stating that the property to which the decree or order relates is a *watan* or part of a *watan*, or that such property constitutes the profits or part of the profits of a *watan*, or is assigned as the remuneration of an officiator, and is, therefore, inalienable, remove any attachment or other process then pending against the said *watan* or any part thereof, or any of the profits thereof, and set aside any sale or order of the sale or transfer thereof, and shall cancel the decree or order complained of so far as it concerns the said *watan* or any part thereof, or any of the profits thereof.

certificate on the 13th March 1890,—that is, more than twelve years after the death of the last holder, Nijaling Naik.

While the above proceedings were going on, Hanmantbhatt, the auction-purchaser, died, and his widow, Bahinabai, and a minor son having refused to part with the lands, and the Collector to whom the certificate was returned by the Subordinate Judge for reconsideration, having declined to cancel it, the Subordinate Judge referred the following question to the High Court :—

Whether he was bound to set aside the sale as desired by the Collector in the certificate issued, as it was, after twelve years from the death of the last holder?

The opinion of the Subordinate Judge was that the Collector's certificate was null and void.

Shivram Vithal Bhandarkar (*amicus curiæ*), for the Applicant Chandra Naik :—The certificate is void, and cannot be acted upon, as it does not state the particulars required by section 10—*Ramangowda v. Shivapa*, P. J. for 1890, p. 263. Further, the Collector cannot now take any action in the matter owing to the provisions of the Limitation Act (XV of 1877). He ought to have taken steps to set aside the sale within three years from its date—Article 178, Schedule II of the Limitation Act (XV of 1877).

[SARGENT, C. J. :—The provisions of the Limitation Act refer to applications. There is no application in the present case.]

[364] The Collector is not a party to this reference; the parties are the representatives of the purchaser at the auction-sale and the original judgment-debtor. Even if it be supposed that the Collector has of his own motion taken action in the matter, still the judgment-debtor or his representative cannot claim the benefit of sixty years' limitation under article 149, Schedule II of the Limitation Act, which applies strictly to Government. If he is acting on behalf of the *watandar* (judgment-debtor) he can claim only such limitation as the *watandar* himself could have claimed—*Gunna Gobind v. The Collector of the Twenty-four Pergunnahs*, 11 Moore's Ind. App., 315. Section 10 of the Watan Act must be read in connection with the provisions of the Limitation Act.

The right to get the sale set aside accrued when the auction-purchaser took possession on the 10th August 1876. Ever since that time, that is, for more than twelve years, the auction-purchaser and his representatives have been in possession without any objection on the part either of the Collector or the *watandar*, who himself was the judgment-debtor. The auction-purchaser's title, therefore, is good by reason of his adverse possession. The property has been in the possession of the auction-purchaser and his representatives for more than twelve years; it has, therefore, lost its *watan* character—*Ludhabai v. Anantrao Bhagvant*, I. L. R., 9 Bom., 198 at p. 232.

Rao Sahib *Vasudao Jayannath Kirtikar* (Government Pleader) for Government :—Article 178, Schedule II of the Limitation Act (XV of 1877) is not applicable to the present case, as no application has been made to set aside the sale. The Collector having held certain inquiry came to a judicial decision that the property was service *watan*, and that decision he communicated to the Subordinate Judge. It is not correct to say that the auction-purchaser's title has become complete by twelve years' adverse possession. It is true that the Collector granted the certificate after the expiration of that period; but the judgment-debtor's son began to move in the matter in the year 1884, that is, about eight years after the auction-sale. His right title and interest cannot, therefore, be allowed to be prejudiced simply because the period of twelve years expired while inquiries were being made by the Collector.

[365] As against the Collector no one can acquire a title by adverse possession till the expiration of the period of sixty years under article 149, Schedule II of the Limitation Act. The provisions of the Watandars Act are similar to the provisions of the Bhagdari Act (Bombay Act V of 1862), and there are rulings to show that under the Bhagdari Act there was no period of limitation prescribed for making an application, and, therefore, such applications were not governed by any particular period under the Limitation Act—*The Collector of Broach v. Rajaram Laldas*, I. L. R., 7 Bom., 542; *The Collector of Thana v. Bhaskar Mahadev*, I. L. R., 8 Bom., 264.

Sargent, C. J. :—The sending the certificate by the Collector as contemplated by section 10 of the Watandars Act is not an application to the civil Court, but only a proceeding in the nature of a notification which, the Watandars Act itself provides, shall be acted upon by the civil Court in a certain manner. Clause 178 of the Limitation Act has, therefore, no application to it. We think that the Subordinate Judge cannot refuse to act on the certificate of the Collector, as expressly required by section 10 of Bombay Act III of 1874. If the purchaser has, since his purchase, acquired a title by adverse possession, it will be for him to take the proper measures to assert it as against the Collector or any other party, as the case may be.

• Order accordingly.

[17 Bom. 365]
APPELLATE CIVIL.

The 20th June, 1892.

PRESENT :

MR. JUSTICE BAYLEY, ACTING CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Chimnaji.....(Original Plaintiff) Appellant
versus

Sakharam and others.....(Original Defendants) Respondents.*

Mortgage—Redemption—Suit for redemption by purchaser of equity of redemption—Evidence given by defendants of a mortgage other than the mortgage in respect of which suit brought—Right of plaintiff to have the question of latter mortgage determined—Practice—Procedure.

• The plaintiff as purchaser of the equity of redemption sued for redemption. He alleged a mortgage, dated A. D. 1849, for Rs. 175. The defendants admitted a mortgage, but alleged that it was executed at a different time and for a larger [366] sum. After the evidence was given, but before the judgment was delivered, the plaintiff applied to amend the plaint and to set up the mortgage admitted by the defendants. His application was refused, and the Court dismissed the suit on the ground that he had failed to prove the particular mortgage alleged in the plaint. The District Judge confirmed the decree, but observed that there probably was a mortgage for the larger sum as alleged by the defendants. • On second appeal,

*Second Appeal No. 255 of 1891.

Held, reversing the decree and remanding the case, that the plaintiff was entitled to have the question of the mortgage for the larger sum inquired into.

SECOND APPEAL from the decision of T. Hart-Davies, Acting Assistant Judge of Poona.

Suit to redeem a mortgaged house.

The plaintiff alleged that on the 1st February 1897, he had purchased the equity of redemption under a mortgage for Rs. 175, dated A. D. 1849, executed by one Rakhmaji to one Shiduji. He now sued to redeem the mortgage.

The first defendant (Sakharam) was a son of the deceased mortgagee Shiduji. He denied the mortgage alleged by the plaintiff, but admitted another mortgage of a different date and for a different amount, *viz.*, for Rs. 256. He further stated that a moiety of the house belonged to him as his share.

Defendant No. 2 (Babaji) was the second son of Shiduji. He denied the mortgage altogether, and claimed the house as his. He also alleged that his brother Sakharam, (defendant No. 1), was in collusion with the plaintiff. He also pleaded limitation.

After the evidence was given, but before the judgment, the plaintiff applied to amend the plaint by alleging a mortgage for Rs. 256. The Court refused the application, but allowed the valuation of the claim to be increased to Rs. 256. It then dismissed the suit, holding that the particular mortgage alleged by the plaintiff was not proved. He was of opinion, however, that the evidence showed that the house had been mortgaged. On appeal the District Judge confirmed the decree, remarking that there probably had been a mortgage executed by the mortgagors to the mortgagee at some date prior to 1855 A. D. for Rs. 256, but, as that was a different transaction from the one sued on, the plaintiff was not entitled to succeed.

[367] The plaintiff preferred a second appeal.

Mahadeo Chimnaji Apte for the Appellant:—The Courts should not have dismissed the suit, both being of opinion that there was a mortgage by the plaintiff's assignors to the defendants' family. The evidence given by plaintiff was *prima facie* sufficient, and it lay on the defendants to displace it—*Hiru v. Bhikaji*, P. J., 1888, p. 131; *Chinto v. Suga*, P. J., 1886, p. 247; *Ganesh v. Vinayak*, P. J., 1889, p. 370; *Raghunath Annaji v. Babaji*, P. J., 1890, p. 297.

The plaintiff ought to have been allowed to amend his plaint, as the nature of the suit would not have been materially affected thereby—*Lakshman v. Hari*, I. L. R., 4 Bom., 584.

Gangaram B. Rele for the Respondent, (defendant No. 2):—The Subordinate Judge was right in not allowing the plaint to be amended. The application was made too late, *viz.*, about a year after the defendant No. 1 filed his written statement alleging the mortgage of Rs. 256, and five days before the judgment. The plaintiff failed to prove the mortgage he alleged in his plaint. He cannot be allowed now to prove another mortgage. When a particular instrument is sued upon, the plaintiff must establish his case on that particular cause of action and not on one similar to it—*Vithaldas v. Yedu*, P. J., 1876, p. 270; *Nursapa v. Bhimangavda*, P. J., 1877, p. 190; *Moro v. Dada*, P. J., 1889, p. 159; *Lakshman Trimbak v. Bhagirathibai*, P. J., 1892, p. 192; *Govindrao v. Ragho*, I. L. R., 8 Bom., 543.

Candy, J.:—The plaintiff sues as purchaser of the equity of redemption from certain Tejis to redeem a mortgage which in his deed of assignment is recited as having been executed in *Shake* 1761 (A. D. 1839) for Rs. 175 to one Shiduji Mali. The first defendant, the elder son of the deceased Shiduji, pleaded that the mortgage was for Rs. 256, and not in *Shake* 1761; the second

defendant, the second son of Shiduji, denied the mortgage altogether; and the third defendant, the sub-mortgagee under defendant No. 1, did not resist the claim.

[368] The Subordinate Judge included in the first issue framed by him the question whether the principal mortgage money was Rs. 175 or Rs. 256, and allowed the valuation of the claim to be increased to Rs. 256, but he rejected the claim, (quoting the case at I. L. R., 8 Bom., 543), on the ground that the particular mortgage recited by plaintiff had not been proved.

The District Judge confirmed this decision, though he thought it probable that there was a mortgage for Rs. 256.

We are of opinion that both the lower Courts have erred. In the case of *Govindrav v. Ragho*, I. L. R., 8 Bom., 543, (on which the Subordinate Judge relied,) the defendant pleaded that the lands were his ancestral property, and denied that there had at any time been any mortgage. Plaintiffs resorted to dishonest artifices to procure evidence of their case, and it was held that as a specific mortgage was sued on, and not proved, the Court was not authorized to give a decree on some indefinite supposed mortgage, which by the hypothesis the plaintiff could not have sued on. That case is easily distinguished from such cases as those to be found at I. L. R., 4 Bom., 584 : P. J. for 1888, p. 131 ; P. J. for 1890, p. 297. In *Lakshman v. Hari*, I. L. R., 4 Bom., 584, defendant admitted that the relations between the plaintiff and himself were those of mortgagor and mortgagee, but pleaded the bar of limitation; it was held that when the question of limitation was decided in plaintiff's favour, then the amount of the mortgage debt was to be decided. The case of *Hiru v. Bhikaji*, P. J., 1888, p. 131, is very similar to the present case, the defendants admitting that there was a mortgage, but pleading that it was for a different sum and of an earlier date. But the case of *Moro v. Dada*, P. J. for 1889, p. 159, was very different; for there the defendant referred to a mortgage only to show that it had been paid off, not to admit any liability upon it.

We think, therefore, in the present case that the plaintiff was entitled to have the question of the mortgage for Rs. 256 inquired into, and we reverse the decrees of the lower Courts and remand the case for a decision on the merits. All costs hitherto incurred to abide the result.

Decree reversed and case remanded.

NOTES.

[This was dissented from in (1896) 18 All., 403 ; (1899) 3 O. C., 173].

[369] APPELLATE CRIMINAL.

The 27th June, 1892.

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Queen-Empress

versus

Khodę Uma and others.*

Criminal Procedure Code (Act X of 1882), Secs. 227 and 237—Charge—Alteration of charge—Conviction for an offence different from that with which accused is charged—Extradition—Lex fori.

The accused were subjects of His Highness the Gaekwar of Baroda. They were extradited for committing dacoity in British India. The Magistrate, who held a preliminary inquiry into the matter, committed the accused to the Sessions Court on a charge under section 398 of the Indian Penal Code (XLV of 1860). The Sessions Judge amended the charge to one under section 395, on the ground that, as the accused had been extradited on a charge under section 395, they could be tried and convicted only under that section, and no other. At the end of the trial, the Sessions Judge finding that the accused were guilty of theft, but not of dacoity, acquitted them.

Held, reversing the order of acquittal, that it was competent to the Sessions Judge to alter the charge under section 227 of the Code of Criminal Procedure (Act X of 1882) and under section 238 to convict the accused of the minor offence, which the evidence established.

Held, also, that the Code of Criminal Procedure was applicable as *lex fori*.

APPEAL by the Local Government against an order of acquittal passed by the Sessions Judge of Ahmedabad.

The accused were subjects of His Highness the Gaekwar of Baroda. They were charged with committing dacoity in a village in the Ahmedabad District. Their extradition was obtained on the representation of the District Magistrate of Ahmedabad that there was evidence to prove a *prima facie* case of dacoity against them.

The Magistrate, who held a preliminary inquiry into the matter, committed the accused for trial to the Court of Session on a charge of attempting to commit dacoity when armed with deadly weapons, an offence punishable under section 398 of the Indian Penal Code.

The Sessions Judge was of opinion that, as the accused had been extradited for dacoity under section 395 of the Penal Code, they could be tried only for that offence, and for no other. He, [370] therefore, amended the charge to one under section 395 of the Code.

At the conclusion of the trial, the Sessions Judge agreeing with one of the assessors acquitted the accused for the following reasons:—

"The facts established against the accused are that they went to the complainant's field to steal grass. While so engaged they were disturbed. They abandoned the booty, and, in order to cover their retreat, they caused hurt to their pursuers, and also threatened them. Following the ruling of the Madras High Court in 1865 cited by both Mayne and Starling in their annotations of the Indian Penal Code, and *Reg. v. Kali*, B. H. C. Cr. Ruling, 27th June 1872, I am of opinion that the accused cannot be convicted of dacoity, and as

* Criminal Appeal, No. 84 of 1892.

they were extradited for trial on that charge, they cannot be tried and convicted of any other."

Against this order of acquittal the Government of Bombay appealed to the High Court.

Lang, (Acting Advocate-General), with *Rao Saheb Vasudev Jagannath Kirtikar* for the Crown:—Section 395 of the Indian Penal Code applies, as the evidence shows that the prisoners, when caught in the act of stealing, caused hurt to the complainant and his men. They were, therefore, guilty of dacoity. But, assuming that they committed theft only, the Sessions Judge had jurisdiction both to try and convict them of this offence. This jurisdiction is not taken away by the mere fact that their extradition was obtained on a charge of some other offence. Extradition is merely a means of bringing the offenders to trial before the proper Court. When they are brought before the proper Court, that Court has jurisdiction to try them on any charge. Jurisdiction is independent of extradition. Jurisdiction is local: see *Clarke on Extradition*, 2nd Ed., p. 101. There is no treaty preventing the British Government trying the prisoners on any charge. The treaty with His Highness the Gaekwar (see *Aitchison's Treaties*, Vol. IV, 230) provides generally for the surrender of all kinds of offenders. It does not specify any particular offence for which they are to be surrendered, or tried when so surrendered. The ordinary law, therefore, applies, and the Sessions Judge had jurisdiction to try and convict the accused of dacoity, or of theft. Section 237* of the Criminal Procedure Code (X of 1882) would allow a conviction even under section 302 of the Indian Penal Code.

There was no appearance for the Accused.

Jardine, J.:—The eight accused were committed for trial for attempt to commit dacoity, under section 398 of the Penal Code. The Sessions Judge amended the charge to one of dacoity under section 395, being of opinion that as they had been handed over by the Gaekwar on a representation that they had committed dacoity they should be tried only under section 395. Differing from one assessor, and agreeing with the other, he acquitted the prisoners and discharged them. The judgment shows that the Sessions Judge was satisfied that the eight prisoners did commit the alleged theft of grass, but that as they had abandoned the grass before they used violence to the owners, and as the violence was used to cover their retreat rather than secure the grass, the offence of dacoity was not committed. He also remarked that "as they were only extradited for trial on that charge they cannot be tried and convicted of any other." He gives no authority in support of this proposition. The Advocate-General has argued on behalf of the appellant, the Governor of Bombay in Council, that the acquittal on the charge of dacoity is wrong, as the evidence is most consistent with the theory that when the prisoners being intercepted by the owners of the grass used violence, they meant by that means to prevent the recovery of the grass. That may possibly have been the fact, and it must have been so held by one of the assessors. But the question of intention is not beyond doubt; and we do not think sufficient reason has been shown for this Court to convict of dacoity. We concur, however, in the contention of the Advocate-General that there is nothing apparent in the circumstances of the extradition to justify the view of the Sessions Judge that the ordinary provisions of the

When a person is charged with one offence, he can be convicted of another.

*[Sec. 237:—If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.]

Criminal Procedure Code were not binding on the Sessions Court as its *lex fori*. We think that it was competent to that Court to alter the charge under sec-[372]tion 227, and that it was incumbent on it in its expressed views on the facts to convict of theft under section 238, when acquitting of the more serious charge of dacoity. The offence was committed in the district of Ahmedabad. Therefore the local law applied: "Crimes are in their nature local: and the jurisdiction of crimes is local." per DE GREY, C. J., in *Rafael v. Verelst*, 2 W. Blackstone, at p. 1058; *Keighley v. Bell*, 4 East. and Fin., 790, and other cases mentioned in Forsyth's Constitutional Law, 249. "By the comity of nations, the country, in which the criminal has been found, has aided the police of the country, against which the crime was committed, in bringing the criminal to justice," per HEATH, J., in *Mure v. Kaye*, 4 Taunt. 43. It appears also that the British Government has a special convention with the Gaekwar, made in 1817, whereby the two contracting parties bind themselves in general terms to hand over "offenders." See Aitchison's Treaties, Vol. IV, p. 230. There seems to be no stipulation that the requisition to the Gaekwar shall state the offence in terms of the Penal Code: and the requirement of justice that the conviction shall be based on the facts proved, and the provision of section 238 of the Procedure Code, which allows conviction for a minor offence not charged, as e.g., for theft on a charge of robbery or dacoity, do not conflict at all with the principles of comity or involve any breach of public faith. We reverse the order of acquittal of the eight prisoners, and convict them of the offence of theft, punishable under section 379 of the Indian Penal Code, and we sentence each of them to rigorous imprisonment for three years.

Telang, J. :—The Sessions Judge has, on the evidence, come to the conclusion that the offence of dacoity is not proved against the accused. And although it is possible to arrive at a different conclusion on the question, whether, when they were obstructed, they had abandoned their booty, still I do not think the evidence is such as to justify us in adopting that conclusion against the opinion of the Sessions Judge. And, if the opinion of the Sessions Judge on the question of fact is accepted, the Madras case quoted by him is an authority for holding that the terms of section 390 are not satisfied. The Sessions Judge was, [373] therefore, right in his decision that the accused in this case could not be properly convicted of dacoity. He has, however, further decided that the accused cannot be tried or convicted on any other charge. He lays it down broadly that when the extradition of an accused person has been obtained on a representation charging him with a particular offence, the Court can try him only for that offence. According to the Sessions Judge's view, it is apparently not competent to the Court to try or convict the accused of any other offence, even though it is of a character cognate to the one mentioned or referred to in the extradition proceedings, and even though it is proved by substantially the same facts as those alleged for obtaining the extradition. The Sessions Judge has not quoted any authority for the proposition he has laid down; and it is certainly not one which can be said to be self-evident. *Prima facie*, indeed, it would appear to be erroneous. For if it is once conceded that the Court before which the accused are put upon their trial has jurisdiction to try them, such jurisdiction must, ordinarily speaking, extend to all offences committed within the jurisdiction of the trying Court, and not lying outside its legal power of investigation. Extradition is only a means of bringing the accused before the tribunals having jurisdiction. It is not even like the sanction for prosecution, for instance, which under section 167 of the old Criminal Procedure Code was held to be indispensable to confer jurisdiction on the Court — *Heg. v. Vinayak Divakar*, 8 Bom. H. C. Rep (Cr. Ca.), 32. Now in the case before us there is,

no doubt; that quite independently of the extradition the Sessions Judge had full jurisdiction to try the accused. Although they are stated to be subjects of His Highness the Gaekwar, the facts on which the prosecution is based are stated to have occurred within British territory. And as Lord Chancellor HALSBURY said in *Macleod v. The Attorney-General for New South Wales*, L. R. (1891) A. C., at p. 458 [See also 8 Bom. H. C. Rep., (Cr. Ca.) 74-9], "all crime is local; the jurisdiction over the crime belongs to the country where the crime is committed." See also Kent's Commentaries quoted in Clarke on Extradition, (2nd Ed.), p. 10. If, then, the jurisdiction of the Court cannot be disputed, what is there to justify the Court in [374] applying at the trial other rules and principles than those which in ordinary cases it is bound to apply under the Code of Criminal Procedure? I confess I can perceive nothing. It is true that in the very recent case of *In re Belencontre*, L. R. (1891) 2 Q. B., 122, which was a case of a *habeas corpus* arising on a warrant which described Belencontre as having been guilty of frauds as a bailee and of frauds as an agent, CAVE, J., having come to the conclusion that the *prima facie* case required by the extradition statutes of 1870-73 was made out only as regards four out of the 19 offences charged against the accused by the French Government, went on to say that "the only object of specifying those cases is in order to give the prisoner the right, if he wishes to make use of it, to object to being tried in France for those other offences—for the other fifteen—on the ground that those are not in themselves crimes for which he could have been extradited." That, however, was a case which arose on the Extradition Acts and the treaty between France and England. And the remark of CAVE, J., above set out does not say what would have been the result if such an objection as he there indicated had been taken before an English Court. See Clarke on Extradition, (2nd Ed.), pp. 98 *et seq.* But in any case it only applies in terms where the objection can be taken that the offence was one for which the prisoner could not properly have been extradited at all. No such objection is shown to be sustainable here. On the contrary, the treaty (see Aitchison's Treaties, Vol. IV, 230) between the British and Gaekwar Governments relates generally to all offenders. See, as to this point, Clarke on Extradition, (2nd Ed.), p. 14. And, therefore, in this case the extradition without any restriction whatever would be perfectly regular; and the jurisdiction independent of it would stand unaffected. Further, assuming that the extradition proceedings could in some way limit the jurisdiction of the Sessions Court, it is plain that there is nothing here on the face of those proceedings to warrant the conclusion that any such limitation has been in fact imposed. The mere circumstance that the offence of dacoity alone is mentioned when extradition is demanded, does not necessarily lead to the conclusion that the extradition is allowed for the purpose of a trial only on that [375] charge, and on no other charge whatever. And in any event it could not exclude a trial and conviction on any charge which the facts disclosed in the extradition proceedings would suffice to sustain. On the whole, therefore, it appears to me that, whether, in law, the jurisdiction of our Courts can or cannot be restricted by the condition on which extradition is allowed, no such restriction has, in fact, been imposed in this particular case, and, therefore, it was open to the Court below, and consequently it was its duty, to have tried the accused in this case under the same rules as apply to ordinary trials under the Code of Criminal Procedure. And the Sessions Judge ought to have convicted the prisoners in this case of the minor offence which the facts proved in evidence showed the prisoners had committed.

Order of acquittal reversed.

[17 Bom. 376]
APPELLATE CIVIL.

The 3rd July, 1892.

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Dagdu.....(Original Defendant) Appellant
versus .

Panchamsing Ganga Ram.....(Original Plaintiff) Respondent.*

Execution sale—Decree—Purchasers at successive execution sales— Title obtained by first purchaser—Certificate of sale obtained by second purchaser before certificate obtained by first purchaser—Priority—Civil Procedure Code (Act XIV of 1882), Sec. 316—What is the title which vests under the section—Limitation in application of provisions of section— Confirmation of sale—Certificate of sale.

On 27th February 1886, the plaintiff purchased certain land at a Court sale held in execution of a decree. On the 10th March 1886, the same property was put up for sale in execution of another decree, and purchased by the defendant. The sale to the defendant was confirmed on 3rd July 1886, and the sale to the plaintiff not until the 21st July 1886. Certificates of sale were issued to both plaintiff and defendant on the same day, viz., on the 22nd September 1886, and on the 14th February 1887, the defendant was put in possession. In 1889, the plaintiff brought this suit to recover possession.

The defendant relied on section 316 of the Civil Procedure Code (Act XIV of 1882). He contended that as under that section the title of a purchaser at a Court sale vests at the date of the confirmation of the sale to him, his (the defendant's) right was superior to that of the plaintiff, inasmuch as the sale to him was confirmed on the 3rd July 1886, while the sale to the plaintiff was not confirmed until afterwards, viz., on the 21st July.

[376] *Held*, that the plaintiff was entitled to recover. By his prior purchase he had acquired an equitable or inchoate title to the property which was subsequently perfected by the certificate of sale. Nothing, therefore, passed to the defendant under his second sale.

The words "the title to the property sold" in section 316 of the Code of Civil Procedure (Act XIV of 1882) mean the full perfected title arising on the sale becoming absolute. It is that title which under the section does not vest in the purchaser until confirmation. That provision, however, need not necessarily be construed as destroying any lesser interest which arises by reason of general equitable principles.

Quære—whether the provision in section 316 as to the date at which the title of the purchaser is to vest, does not apply only as between the parties to the suit and persons claiming through or under them.

Per JARDINE, J. :—The reference to parties and persons claiming under them would be surplusage if the Legislature had intended the addition to apply to third parties.

SECOND APPEAL from the decision of Khan Bahadur N. N. Nanavati, First Class Subordinate Judge at Dhulia with Appellate Powers, in Appeal No. 81 of 1889 of the District File.

The plaintiff, Panchamsing, sued to recover possession of four fields (Survey Nos. 6, 21, 22 and 23) and for mesne profits for the years 1887 and 1888.

The fields in question belonged originally to three brothers—Supdu, Sampat and Mahipat—jointly.

On 27th February 1886, the fields were sold to the plaintiff in execution of a decree against Supdu and his brothers.

* Second Appeal, No. 228 of 1891.

On 10th March 1886, the same fields were put up to sale in execution of another decree against Supdu alone, and purchased by the defendant.

The sale to the defendant was confirmed on 3rd July 1886.

The sale to the plaintiff was not confirmed until the 21st July 1886.

The sale certificates were issued to both plaintiff and defendant on the same day, i.e., 22nd September 1886.

The defendant's certificate of sale was registered on 16th October 1886, and the plaintiff's a month later, viz., on 16th November 1886.

On 14th February 1887, the defendant was put in possession.

[377] The principal question at issue between the parties was—who was entitled to priority, plaintiff or defendant, with respect to the lands in suit?

The Court of First Instance decided this issue in the defendant's favour, on the ground that his certificate of sale was registered prior to plaintiff's certificate, and also that he had obtained possession. The suit was, therefore, dismissed with costs.

On appeal the Subordinate Judge with Appellate Powers held, on the authority of *Prangour v. Himanta*, I. L. R., 12 Cal., 597, that the sale to the plaintiff, not having been set aside at the time of the second sale, was a good and effectual sale to pass the property, so that there was nothing left to pass to the defendant under the second sale.

He, therefore, reversed the decree of the first Court and awarded the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Mahadev V. Bhat for Appellant :—This is a case between two competing purchasers at Court sales. Under section 316 of the Code of Civil Procedure (Act XIV of 1882) the title to the property sold vests in the purchaser from the date of the certificate of sale, and not before, and the date of the certificate must be the date of the confirmation of sale. In this case the sale to the defendant was confirmed before the confirmation of the sale to the plaintiff; therefore, under the section the property became vested in him. How could it be divested by the subsequent confirmation of the sale to the plaintiff? The defendant's purchase was, moreover, accompanied with possession. The defendant has, therefore, a better title—*Prem Chand Pal v. Purnima Das*, I. L. R., 15 Cal., 546; *Nanjundepa v. Hemapa*, I. L. R., 9 Bom., 10; *Lachminarayan v. Indrabhan*, P. J. 1883, p. 254.

Mahadev C. Apte for Respondent :—By the sale to the plaintiff on the 27th February 1886, all the right, title, and interest of the judgment-debtor passed to the plaintiff. There was then nothing left to pass to the defendant by the subsequent sale on the 10th March 1886. The sale to the plaintiff stands good until it is set aside. It gave an equitable or inchoate title to the [378] plaintiff as purchaser. And that title became absolute when the sale was confirmed, and he obtained the formal certificate of sale.

His title, which was inchoate before, was perfected by the issue of the sale certificate. Nothing, therefore, passed to the defendant under the second sale—*Yeshvant v. Govind*, I. L. R., 10 Bom., 453; *Prangour v. Himanta*, I. L. R., 12 Cal., 597. Section 316, clause 2 of the Code of Civil Procedure does not apply to auction-purchasers. It refers to the parties to the suit and persons claiming through them, and not to strangers.

Telang, J. :—The question raised in this case is one upon which, apparently, there has not been yet any authoritative decision in this Court. On 27th February 1886, the property in dispute was sold at an execution sale and knocked down to the plaintiff. On 10th March 1886, the property was sold

again, also in execution of a decree, and knocked down to the defendant. The latter sale was confirmed on 3rd July 1886, and the former subsequently on 21st July 1886. Certificates of sale were issued both to the plaintiff and defendant on 22nd September 1886, and on 14th February 1887, the defendant was put in possession. On the findings of the Court below, it is quite clear that the sale to the defendant was a sale only of the share of Supdu, while the sale to the plaintiff was a sale of the shares of Supdu and all his brothers. The plaintiff, therefore, is, in any event, entitled to the relief he claims as regards the shares and interests of Supdu's brothers. And the question is simply, as regards the share of Supdu, whether, in the events which have happened, it now belongs to the plaintiff or the defendant.

It will conduce to a clear understanding of the case, I think, if we ascertain the respective rights of the parties at the various dates which have been above mentioned. On the 27th February 1886, the sale to the plaintiff took place. At that time the defendant had admittedly no right to the property—present, future, vested, or contingent. And, according to the decisions of our Courts, the plaintiff then by virtue of such sale obtained an equitable interest in the property, which has been sometimes described as "inchoate," sometimes as "contingent." In *Kanapa* [379] v. *Janardan*, 11 Bom. H. C. Rep., 193 at p. 194, Sir M. R. WESTROPP spoke of the purchaser in such a case obtaining, as from the date of the sale, "a contingent right to the land, i.e., contingent on subsequent confirmation." In the case of *Rajah Hossein Buksh Khan v. Baboo Roy Dhunput Sing Bahadoor*, 18 C. W. R., 289 at p. 290, payments made by a purchaser before confirmation of sale were allowed to such purchaser on the sale being subsequently set aside, Sir R. COUCH saying: "The plaintiff by his purchase at the auction sale had acquired an inchoate right to the property. If the sale had been confirmed, he would have become the absolute purchaser." These cases, it is true, were decided under the old Civil Procedure Code, but the doctrine laid down in them was not based on the provisions of that Code, but on general equitable principles.*

The question, then, is whether there is anything in the provisions of the present Code (XIV of 1882) which should be held to prevent such equitable interests arising. The words of the Code, section 316, at first sight certainly seem to bear some such signification. "The title to the property," that section says, "vests in the purchaser upon the confirmation and not before." But I am, on the whole, of opinion, that these words are not necessarily inconsistent with the equitable interest accruing from the sale. What is the meaning of "the title to the property?" That phrase, according to its ordinary meaning, must, I apprehend, be held to apply only to a full perfected title, not to that "contingent" or "inchoate" title which Sir M. R. WESTROPP and Sir R. COUCH spoke of in the cases above cited. Such a perfected title, doubtless, does not vest in the purchaser before confirmation. But is a provision, which enacts that, to be necessarily construed as destroying any lesser interest which arises by reason of general equitable principles? I am not satisfied that that is the necessary result of putting its ordinary grammatical sense on the language used by the Legislature. And, if that is not necessarily the ordinary grammatical sense, I can see some very weighty reasons for holding that we should not attribute that sense to the words. Suppose, for instance, the delay in [380] obtaining confirmation of the first execution sale is due to a vexatious or fraudulent attempt on the part of the judgment-debtor to set aside the sale, an attempt perhaps even based on collusion between the judgment-debtor and

* Cf. also *Nanjundepa v. Hemapa*, I. L. R., 9 Bom., 10; and *Yeshwant v. Govind*, I. L. R., 10 Bom., 453.

another creditor. Such an attempt may, of course, result in protracted litigation, and while such litigation is pending, the other creditor of the same judgment-debtor may get the property sold and the sale confirmed. Is the first purchaser to lose the benefit of his purchase under such circumstances for no fault of his own, and possibly even by the fraud and collusion of the judgment-debtor and the subsequent execution-creditor? Unless the words of the Legislature, reasonably construed, are incapable of bearing any other interpretation, I should be unwilling to sanction this. Again, if the later purchase prevails, either the previous purchaser loses his money most inequitably; or if he is allowed a refund of it on the ground of there having been a total failure of consideration—though it is difficult to see precisely how this is to be practically done—the first execution-creditor is put to an inequitable loss, for which he may, conceivably, be quite unable to reimburse himself. On the other hand, if it is held that the previous sale prevails, there is no injustice to the later purchaser, who avowedly is a speculative purchaser, or at all events is not entitled to the privileges of a *bond fide* purchaser for valuable consideration (compare *Sobhagchand v. Bhairchand* per MELVILL, J., I. L. R., 6 Bom., at p. 207). These considerations appear to me to lead to the conclusion, that we ought not to adopt the construction contended for on behalf of the appellants, unless the words used by the Legislature cannot reasonably be made to yield any other meaning.

To come back, then, to the words of the section itself. I have already pointed out that the words, "the title to the property shall not vest before the certificate," are not necessarily inconsistent with the subsistence of an equitable interest short of the full perfected title in the purchaser even before the certificate issues. And the facts, that the transaction which takes place at the time of the auction is called a sale, that a cancellation of it is called the setting aside of a sale, that a subsequent auction [381] after the failure of the first is called a re-sale—all these things show that in the contemplation of the Legislature the transaction even before confirmation and issue of certificate is a sale—though a sale liable to be set aside. It is something more, therefore, in its legal aspect, than a mere contract for sale, and must be treated as lying outside the scope of those differences of opinion which were referred to by Sir M. R. WESTROPP in *Waman v. Dhondiba*, I. L. R., 4 Bom., 126, and, therefore, rendering it unnecessary to inquire with any minuteness whether any real interest in the property itself resulted from the transaction or not.

There is in the same section, however, another phrase which requires notice:—"So far as regards parties to the suit and those claiming through or under them." The High Court of Calcutta (NORRIS and BEVERLEY, JJ.), *Prem Chand Pal v. Purnima Dasi*, I. L. R., 15 Cal., 546, has construed that phrase; and that Court has held that, if the title "as regards the parties to the suit" does not vest till after a particular date, it cannot, as regards third parties, date from any earlier period. It is impossible not to feel the force of this view. On the other hand, however, it ought not to be forgotten, that on this construction the whole of the clause above set out becomes mere surplusage. If the "vesting" takes effect at the same time "as regards parties to the suit" and as regards third parties, there is no obvious object in expressly specifying the former. It may, doubtless, be said that there is an object in specifying it, because the vesting may possibly take effect later as regards third parties. But it is not easy to imagine the case for which such a provision would be needed. I am myself, therefore, rather inclined to think, that the whole of the clause relating to the time when the vesting is to take effect was put in to give legislative form to the law as already laid down by the Courts under the Act of 1859, and in

giving it such a form, it was thought desirable to insert the parenthetical clause above referred to in view of the similar words which occur in section 312, touching the confirmation of the sale, and which were most probably inserted merely *ex abundanti cautela*. If this is so, it [382] is not improbable that there was no intention on the part of the Legislature to disturb the equitable rights flowing from the completion of the auction sale, but only to regulate such matters as arose, for instance, in *Basapa v. Marya*, I. L. R., 3 Bom., 433, or *Harkisandas v. Bai Ichha*, I. L. R., 4 Bom., 155. I think it would not be contrary to the rules laid down in the case of *Bank of England v. Vagliano Brothers*, L. R. (1891), A. C., 107, and it would be in accordance with one of the rules in *Heydon's case** to look to the old law and the decisions under it, so far as is necessary to arrive at such an interpretation of section 316.

On the whole, therefore, it appears to me, that we cannot decide the present case in favour of the defendant, without holding that an execution sale by the Court, before it is confirmed, creates not only no title to the property, but no right *in re* whatever, not even any equitable interest in the property. Apart from the Civil Procedure Code, it would, I think, be impossible to hold this. And, in the words of the Code, I can find no adequate support for the view, that the Legislature intended that such equitable interests, which had been constantly given effect to by the Courts, as a matter of substantive law, should now cease to be recognized. I am, therefore, of opinion that the decree of the Court below is right, and should be affirmed with costs.

Jardine, J. :—I am of the same opinion and concur in the proposed decree. I agree with my learned colleague in the reasons he has given. I think the reference to the parties and persons claiming under them in the addition made to section 316 in Act XII of 1879, re-enacted in the Code, Act XIV of 1882, would be surplusage if the Legislature had intended the addition to apply to third parties. The addition requires the certificate to bear the date of the confirmation of the sale; and section 314 declares that no sale of immoveable property shall become absolute until it has been confirmed; the new words in section 316 as to the date when "the title to the property sold shall vest" seem to me technical and to point to the complete title arising on the [383] sale becoming absolute, such as might be requisite to enable the purchaser to bring a suit in ejectment, but distinguishable from the inchoate title which suffices for a suit of an equitable nature. The distinction is illustrated by WESTROPP, C. J., in *Krishnaji v. Ganesh*, I. L. R., 6 Bom., 139.

There are many reported cases in which the right in equity of a third party to bring suit on the imperfect title has been declared before 1879: I take the Full Bench case of *Bhyrub Chunder v. Soudamini Dabee*, I. L. R., 2 Cal., 141, to be one of them; and it is not to be supposed that the Legislature in 1879 and 1882 was not aware of the settled doctrine which was applied by the High Courts up to the time when this addition to section 316 was made, as appears from *Yeshuant v. Govind*, I. L. R., 10 Bom., 453, and *Prem Chand Pal v. Purnima Dasi*, I. L. R., 15 Cal., 546. With reference to the remarks of NORRIS, J., in that case I would observe that it appears difficult to hold that the words of the new part of section 316, which omit mention of strangers to the suit, can be construed to include them by inference, as that construction would abolish rights protected by a firmly established application of equity. Had this been the intention of the Legislature, express words would have been used. With regard to BEVERLEY, J.'s concluding remark in that same case, I would also

* 3 Rep. 7b; and compare *Felton v. Harrison*, L. R. (1891), 2 Q. B., 422; *Connur v. Kent*, *ibid.*, 545; and *In re Leon*, L. R. (1852), 1 Ch., 348.

observe that the reasoning in *Prangour, v. Himanta*, I. L. R., 12 Cal., 597, commends itself to me as a correct interpretation of section 316 as amended.

Decree confirmed.

NOTES.

[Under the C. P. C., 1908, sec. 65, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

An inchoate title was recognised in (1896) 19 All., 168; (1900) 22 All., 168; (1910) 33 All., 45 (where this decision is explained); (1898) 2 C. W. N., 589; (1903) P. R., 9; (1906) P. R., 11; (1907) 11 C. W. N., 495; 7 C. L. J., 1; (1909) 2 I. C., 81; see also (1898) 26 Cal., 176; (1900) 22 All., 168.]

[384] ORIGINAL CIVIL.

The 17th December, 1892.

PRESENT :

MR. JUSTICE STARLING.

Anandrao Vithal Varadi.....Plaintiff

versus

Budra Malla, Purkha Dholia and Hariba Tukaram
Varadi.....Defendants.

Practice—Inspection—Production—Discovery—Co-defendants—

Inspection granted to defendant against co-defendant—Civil

Procedure Code (Act XIV of 1882), Secs. 129 and 131.

A defendant may obtain discovery or inspection as against a co-defendant if the latter can be regarded as an opposite party.

The plaintiff sued to set aside a mortgage made by the third defendant (his uncle) to defendants Nos. 1 and 2, alleging that shortly after he (the plaintiff) had attained his majority he had been induced to join in the mortgage by the undue influence and threats of the third defendant, who represented that the money to be raised by the mortgage was required to pay off the debts of the plaintiff's father. The plaintiff further alleged that he had received none of the money and that no money had been paid by defendants Nos. 1 and 2 to the third defendant in his presence. Defendants Nos. 1 and 2 took out a summons against the third defendant for inspection of certain account books and documents. It was objected that no question was raised in the suit between the third defendant and defendants Nos. 1 and 2, and that consequently, under section 131 of the Civil Procedure Code (Act XIV of 1882), the latter were not entitled to inspection.

Held, that inspection must be given. It was possible that not being able to set aside the mortgage as regarded himself, the third defendant was colluding with the plaintiff. Under the circumstances he might be considered a "party opposite" to the first two defendants, although eventually the Court might not be able to make any order between him and them.

* Suit No. 236 of 1892.

In chambers. Summons for inspection.

The first two defendants were Marwaris trading in partnership under the name of Dholia Cutchra. The third defendant was the uncle of the plaintiff, being his deceased father's brother.

The plaintiff alleged that his father, Vithal Tukaram Varadi, died intestate in July 1887, and left a widow and the plaintiff, his only son, who was then a minor, his heirs according to Kintu law.

The third defendant, Hariba, obtained letters of administration, *durante minoritate*, to the estate of the said Vithal. He and [385] Vithal had been jointly the administrators of the estate of their father, Tukaram Varadi (the plaintiff's grandfather), and Hariba, after Vithal's death, continued to administer that estate in which the plaintiff claimed his father's share.

The plaintiff attained his majority in November 1888. He complained that Hariba (defendant No. 3) had not made over to him his father's estate, or his share of his grandfather's estate, or accounted for the same, and he alleged that on the 11th February 1890, Hariba (defendant No. 3) by undue influence and threats had induced him to execute a mortgage of certain properties to defendants Nos. 1 and 2 for Rs. 42,000, falsely and fraudulently stating that the money was required to pay off certain debts of his father's. He alleged that he had received no money from the first and second defendants, nor had any money been paid by them to Hariba in his (plaintiff's) presence. He prayed that the said mortgage might be set aside, and that inquiry might be made as to whether any debts were due by his father Vithal, &c., &c.

The suit was filed on the 22nd April 1892. Hariba (defendant No. 3) filed a written statement denying in a very guarded manner the plaintiff's allegations.

On the 6th November 1892, a summons was taken out by the first and second defendants, calling on the third defendant Hariba to show cause why he should not allow them inspection of certain account books and documents.

Payne (for Defendant No. 3) showed cause:—The applicants are not entitled to inspection as against their co-defendant. There are no questions raised between them—Civil Procedure Code, (XIV of 1882), Sections 129 and 131*; *Peile on Discovery*, [386] p. 10; *Brown v. Watkins*, 16 Q. B. D., 125. Further, the affidavits do not show that the documents are in our possession.

Lang (Acting Advocate-General), for Defendants Nos. 1 and 2, in support of the rule:—The defendants are entitled to inspection. The plaintiff sues to set aside a mortgage made to them by himself and third defendant. The third defendant ought really to be a plaintiff in this suit.

Starling, J.:—This is a summons by two defendants for inspection of documents in the possession of the third defendant.

* Section 129:—

The Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order.

Section 131:—

Any party to a suit may, at any time before or at the hearing thereof, give notice through the Court to any other party to produce any specified document, for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

Mr. Payne showed cause against the summons, and argued that although under section 131 of the Civil Procedure Code, (XIV of 1882), any party to the suit may call upon any other party to the suit to produce for his inspection any specified document, yet that "any other party" must mean "opposite party," and, further, that "opposite party" in respect of a defendant can only mean the plaintiff and not a co-defendant. In this contention he is supported by the judgment in the case of *Brown v. Watkins*, 16 Q. B. D., 125, as the Court came to the conclusion that the rule under discussion there, which corresponds to section 131 of the Civil Procedure Code, (Act XIV of 1882), did not authorize granting discovery as between co-defendants. This case has, however, been discussed in the Court of appeal in the case of *Shaw v. Smith*, 18 Q. B. D., 193, and the Court held that "opposite party" did not refer only to the defendant as contrasted with the plaintiff, or *vice versa*, but to any two parties, whether plaintiff or defendants, co-plaintiffs or co-defendants, between whom it was necessary to adjust rights. Agreeing, as I do, with this view of the section, I am of opinion that there is no objection to one defendant seeking discovery or inspection as against a co-defendant, provided that co-defendant can be regarded as an opposite party.

[387] The question I have, therefore, to decide is whether the third defendant, against whom inspection is sought, is a party opposite to the first two defendants.

It appears that one Vithal Tukaram, the father of the plaintiff, died in 1887, leaving the plaintiff a minor. On his death the third defendant obtained letters of administration to Vithal's estate *durante minoritate* of the plaintiff. Shortly after the plaintiff attained his majority, he and the third defendant executed a mortgage of Vithal's estate, the consideration for which was alleged to be certain debts due by Vithal on promissory notes, advances made to the third defendant for the purposes of the administration, and a sum paid in cash on the execution of the mortgage-deed. The plaintiff now seeks to have the mortgage set aside and an account taken of what is really due in respect of the alleged consideration, alleging fraud and misrepresentation and undue influence on the part of the third defendant as to the debts of Vithal and the amount borrowed by him, and denying that the amount which ought to have been paid in cash was so paid.

Now, if the mortgage transaction was honest, and the suit not brought by the plaintiff in collusion with the third defendant, I should have expected to find, in the written statement of this defendant, not merely a general denial of fraud, &c., but a distinct assertion of what the consideration was, and a positive statement that the moneys were due or had been paid. Instead of this I find only general denials of fraud, &c., but no assertion that the promissory notes were existing at the time of the execution of the mortgage-deed, or that anything was done in respect of them. The defendant further does not assert that he actually borrowed any money for the purposes of the administration, nor does he say that the money which the mortgage deed showed he had received in cash was so received. Further, he assents to an account being taken. The only account, however, asked for in the plaint is subject to the mortgage being set aside, and assumes that the circumstances which will be proved will be such as will induce the Court to say that the mortgage cannot be held to be good for anything more than can be proved on an account being taken of the various items which make up the [388] consideration. Consequently, it seems to me to be very possible that, not being able to set aside the mortgage as regards himself, he is colluding with the plaintiff to enable him to save what he can from the fire. Under these circumstances I consider

him to be a "party opposite" to the first two defendants, although eventually the Court may not be able to make any order between him and them.

I, therefore, allow the first two defendants inspection of the documents set forth in part 1 of the first schedule to the third defendant's affidavit of documents affirmed on the 11th day of October 1892, and filed on the 19th day of November 1892.

With regard to the other documents of which inspection is sought, the third defendant distinctly swears that they are not in his possession, power, or control; and however much I may suspect the entire truth of that statement, there is nothing on the face of his affidavit which would enable me at the present stage to make further enquiries.

Attorneys for the Plaintiff:—Messrs. *Chalk, Walker and Smetham*.

Attorneys for the first and second Defendants:—Messrs. *Janardan and Ardeskur*.

Attorneys for the third Defendant:—Messrs. *Payne, Gilbert and Sayani*.

[17 Bom. 388]

TESTAMENTARY JURISDICTION.

The 19th December, 1892.

PRESENT:

MR. JUSTICE STARLING.

Yeshwant Bhagwant Phatarpakar.....Plaintiff

versus

Shankar Ramchandra Phatarpakar.....Defendant.*

Practice—Receiver—Receiver in testamentary suit—Succession Act (X of 1865), Sec. 239.

The High Court has power to appoint a receiver in a testamentary suit.

TESTAMENTARY suit. In this suit a consent order was made on the 26th November 1892, whereby it was ordered that the plaintiff should produce all the ornaments in his possession, [389] belonging to the estate of Bhagu Naikin Phatarpakar, deceased, before the attorneys of both parties, and that an inventory thereof and of all furniture and other moveables belonging to the estate should be made by the attorneys, and that the ornaments should be deposited in the Bank of Bombay in the name of the attorneys, &c. By the same order Mr. L. A. Watkins was appointed receiver to receive the rents of the immoveable property belonging to the estate.

Disputes immediately arose as to the amount of the property, and on the 3rd December 1892, a *rule nisi* was obtained by the defendant calling on the plaintiff to show cause why Mr L. A. Watkins, the receiver appointed in the suit, should not be ordered to take possession of all the estate of

* Testamentary Suit, No. 23 of 1892.

Bhagu Naikin not produced before the attorneys in accordance with the order made on the 26th November 1892.*

Jardine for the Plaintiff showed cause.

Inverarity, contra, in support of the rule.

Starling, J. :—In this matter Mr. Inverarity on the 26th November applied for an order that the Administrator-General should take possession of the estate and effects of Bhagu Naikin under section 18 of the Administrator-General's Act (II of 1874). This was opposed by the Advocate-General on behalf of one Yeshwant, who alleges that he is the executor of the will of the said Bhagu and has applied for probate thereof, to which Mr. Inverarity's client, Raghunath Narayan, has entered a caveat. Eventually, by consent of both counsel, it was ordered that all the ornaments of Bhagu should be produced to the solicitors of both parties, a list made of them, and that they should then be deposited in the Bank of Bombay, that all the other moveable property of Bhagu should be produced, and a list made of it, after which it was to remain in the possession of Yeshwant, he undertaking not to dispose of it, and Mr. Watkins was appointed receiver to collect the amount of the immoveable property.

On the 3rd December it was alleged that Yeshwant had not obeyed that order, in that he had not produced all the ornaments or household property of Bhagu, and that he had not produced the cash belonging to her estate, which was in his hands, and the [390] Court was asked to make an order that the receiver should take possession of all the moveable property of Bhagu not heretofore produced by Yeshwant. A rule was granted by me calling upon Yeshwant to show cause why this order should not be made. On the 19th December Mr. Jardine appeared to show cause against the rule. As this motion is opposed, I must consider whether this Court in a testamentary suit can appoint a receiver.

In England, the Court of Chancery, in cases of disputed representation in the Ecclesiastical Courts, was in the habit, on a proper case being made, of appointing, *pendente lite*, a receiver of property the representation of the former owner of which was in dispute: see *Watkins v. Brent*, 1 Myl. and Cr. at p. 102; *Rendall v. Rendall*, 1 Hare, 152; and since the Court of Probate Act, 1857, came into force, the Court of Chancery has exercised the same power—*Parkin v. Seddons*, L. R., 16 Eq., 34. But these were orders of a civil Court made in suits filed for the specific purpose of obtaining a receiver. The Court of Probate Act, 1857, however, gave authority to the Testamentary Court to appoint an administrator provisionally to take charge of the personal estate of a deceased person pending any suit touching the validity of his will, and to appoint such administrator or any other person receiver to collect the rent of and to manage his real estate. These provisions have been consolidated and transferred into the Indian Succession Act (X of 1865), section 239, which empowers the Court to appoint an officer to take and keep possession of the property of a deceased person until probate or letters of administration are granted. This section, however, is not repeated in the Probate and Administration Act, V of 1881. I should have no hesitation in acting under this section if the will was one to which the Indian Succession Act applied, but as the will in the present case would apparently be governed by the Probate and Administration Act, 1881, it is necessary to look more closely into the question.

The section by which this will would be excluded from the Indian Succession Act is section 331, but that only excludes [391] from the operation of that Act intestate or testamentary succession of Hindus, and does not forbid the procedure provided thereby (in the course of granting probates, &c.) to be

applied to Hindu or other excepted wills. See the case of *Kokya Dine*, 2 Beng. L. R., (A. C. J.), 79, which was with reference to a Buddhist will. Why, then, was this useful provision not inserted in the Probate and Administration Act, 1881? My own impression is that the framers of that Act having provided in section 55 that proceedings in relation to the granting of probate and letters of administration should be regulated by the Civil Procedure Code, and knowing the provisions of that Code as to receivers, and seeking to avoid the repetition, in the Probate Act, of any provision which was in the Civil Procedure Code, have left the appointment of a receiver to be regulated by the provisions of that Code. For these reasons I should, without difficulty, have come to the conclusion that this Court in its testamentary jurisdiction had power to appoint a receiver.

Mr. Jardine has, however, referred me to a motion in Testamentary Suit No. 11 of 1891, in which FARRAN, J., on the 13th August 1891, refused to appoint a receiver. There is no written judgment, and consequently I cannot ascertain whether the refusal was on the merits or on a point of law. It was, however, argued that the property of the deceased was not the subject of a suit. Possibly not directly, but the present suit is to determine who is to have the possession and management of the property of the deceased,—in fact, who is to be the person in whom all the rights of the deceased are to vest, and thus become the legal owner. If a suit were brought on the civil side to determine who had the right to the possession and management of property, the provisions of the Specific Relief Act I of 1877 would ordinarily require a prayer to be inserted for possession of the property, but I cannot see the substantial difference, as regards *interim* remedies, between a suit in this form and a suit on the testamentary side, the result of which will be to declare that, by virtue of the provisions of a will, a certain person has the right to stand in the shoes of a deceased owner, and thus be entitled to have the possession and management of all his property.

[392] It seems to me that the property is the subject of the suit, in the one case, directly, because possession is sought, and in the other, because the decree will determine who is to have authority over, and to be entitled to get possession of, certain property which is set out in a schedule to the petition for probate or letters of administration. Consequently I see nothing in the law relating to procedure which would prevent me appointing a receiver in this case without regard to any consent on the part of the plaintiff.

It is true that the Administrator-General's Act empowers the Court to authorize and require the Administrator-General to take charge of property of deceased persons which is in danger, yet I doubt whether this provision deprives the Court of any other powers it may possess; and, although in many cases the Administrator-General might most conveniently be appointed, a receiver might be better in others. In the present case, a receiver has by consent been appointed for certain purposes, and I, therefore, consider that, if the Court is to take any action, it will be better to enlarge the present receiver's powers than to enjoin the Administrator-General to take possession of the assets of the estate.

Has any ground, then, been made on the facts of the case for such an appointment? In the first place, when the consent order was made, it was certainly a distinct understanding that every portion of the moveable property of the deceased was to be produced and entered in an inventory, and by what passed in Court must the parties have alone been guided, as the order was not drawn up till some days after it was carried out, so far as it has been obeyed. The plaintiff did not, however, produce the cash in his hands, and it was not

until after enquiries from the defendant's solicitors that the plaintiff mentioned the amount thereof. As to the ornaments admitted by the defendant to belong to the estate; those produced and inventoried appear in two lists, one in the handwriting of the plaintiff, which he says has always been with him, and the other partly in the handwriting of the plaintiff and partly in that of the defendant, which has been in the possession of the defendant, and as far as these ornaments are concerned these two agree. In the same lists [393] and mixed up with the foregoing ornaments, are others which the plaintiff asserts, belong to his wife, but there is nothing in these lists to indicate that fact, or to distinguish them from those which he admits belonged to Bhagu, and it is difficult to understand why, if they did belong to plaintiff's wife, they should have been inserted in a list which was given to the defendant at the time the safe was locked up and sealed.

It is also a suspicious fact that, in the absence of the defendants, the plaintiff broke the defendants' seal which had been put on the safe, and took out the ornaments now in dispute. It looks very much as if some portion at least of these ornaments belonged to the deceased Bhagu. I, however, do not decide that question at the present time, but I think under all the circumstances of this case I am justified in extending the power of Mr. Watkins, by appointing him receiver without security to recover and take possession of all the cash and moveable property belonging to the deceased which has not been produced by the plaintiff to the solicitors of the two parties and entered into the inventory made by them. Costs must be costs in the cause.

Attorneys for the Plaintiff :—Messrs *Mansukhlal, Damodar and Jamsetji.*

Attorneys for the Defendants :—Messrs. *Chitnis, Motilal and Malvi.*

NOTES.

[See also (1893) 18 Bom., 237.]

[394] ORIGINAL CIVIL.

The 27th January, 1893.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Govardhandas Goculdas Tejpal.....Plaintiff

versus

The Municipal Commissioner.....Defendant.*

Municipal Act (Bombay) III of 1888, Sec. 158—Tax—Drawback—General conditions prescribed by Standing Committee limiting right to drawback under Section 158—Ultra vires.

Under section 158 of the City of Bombay Municipal Act (Bombay Act III of 1888) the following general conditions were prescribed by the Standing Committee with reference to claims for drawback of the general property tax leviable in Bombay :—

"(1) Except with the special sanction of the Commissioner, no claim for drawback shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half year to which such claim relates.

* Appeal No. M/45 of 1892.

(2) Drawback of the one-fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others :

(a) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods.

(b) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold."

The Commissioner having refused to sanction a drawback of the tax leviable on certain properties of the plaintiff on the ground that they did not fall within the terms of the above conditions, the plaintiff filed this suit. It was contended in his behalf that the second and third of the above conditions were bad, and that the Standing Committee could not by so-called general conditions limit or curtail the right given to tax-payers by section 158.

Held, that the conditions prescribed by the Standing Committee were not *ultra vires* and that the Commissioner was justified in refusing the drawback.

CASE stated for the decision of the High Court under section 2 of Act XII of 1888 by C. W. Chitty, Chief Judge of the Court of Small Causes :—

"1. This is an appeal against the decision of the Municipal Commissioner refusing to sanction a drawback of one-fifth part of the general tax leviable in respect of certain immoveable properties belonging to the appellant.

[395] "2. There is no dispute as to the facts of the case. It is admitted that all the properties named in the petition of appeal consist of buildings which are let out in flats; in two cases the ground floor is occupied by shops. With this exception all the premises are used as lodgings for tenants, but are not let out entirely in single rooms. The said buildings are let to two or more persons holding in severalty, and the Municipal Commissioner has, for the purpose of assessing such buildings to the property tax, treated the whole of each of such buildings as one property.

"3. The Municipal Commissioner refused to sanction a drawback in respect of the said properties, on the ground that they did not fall within the terms of the general conditions prescribed by the Standing Committee. It should be mentioned that no exception was taken to the first of such general conditions.

"4. On behalf of the appellant it was argued that the second and third general conditions were bad; that, in as much as it has been held by the High Court that 'may' in section 158 is to be read as 'shall,' section 158 is positive and compulsory, that the Standing Committee cannot by so-called general conditions limit or curtail the right given to tax-payers by section 158, and that the second and third conditions are inconsistent, one with the other.

"For the respondent it was contended that the drawback was properly refused; that the Act itself limits the right of tax-payers by making the sanction of drawback subject to the general conditions prescribed; and that the general conditions are reasonable, if the Standing Committee have the right to say that the drawback is not to be granted in every case which comes within the terms of section 158.

"5. The conditions and circumstances under which drawback was allowed when the former Act was in force were prescribed by the Act itself (see Bombay Municipal Act, 1872, section 76), and it will be seen that the conditions now prescribed are slightly more favourable to the tax-payer, and there can be little doubt that they are not in themselves unreasonable. I had some doubt whether in this case it was open to this Court to go behind such [396] general conditions duly prescribed by the Standing Committee; but, assuming that the

Court has that power, two questions arise: (1) whether the general conditions of the 10th March 1892, limit the 'rights of tax-payers under section 158, and (2) whether the Standing Committee have power to make such conditions.

"6. In expressing my opinion on the above points I may say, with regard to the first question, that, in my opinion, it should be answered in the affirmative. There is nothing in section 158 itself, except the words 'subject to any general conditions, &c.', which in any way restrict or limit the right of the tax-payers to the allowance of drawbacks in all cases falling within the terms of the section, whereas the conditions confine the allowance to certain classes of property. As to whether the Standing Committee have power to make such conditions, it would appear, from comparison of the former and present Acts, that the Legislature intended to vest in the Standing Committee the power of restricting such allowances, which power was formerly exercised by the Legislature itself (section 76). It would, however, be expected that, if it were so intended, the word 'limitation' or 'restriction' would be used with or in place of the word 'condition,' which applies rather to the method of sanctioning allowances. At the same time I think that the words 'general conditions' are wide enough to include limitations or restrictions, and that, therefore, the Standing Committee have the power to make such conditions as those in question. There can be little doubt that, if the contrary be held, it would have the effect of rendering compulsory the allowance of drawback in many cases where it was never intended, and would be unreasonable."

Section 158 of the City of Bombay Municipal Act (III of 1888) is as follows:—

(1) When any building or land is let to two or more persons holding in severalty, the Commissioner may, for the purpose of assessing such building or land to the property taxes, either treat the whole thereof as one property or with the written consent of the owner of such building or land treat each several holding therein or any two or more of such several holdings together or each floor or flat, as a separate property.

(2) When the Commissioner has determined to treat all the several holdings, comprised within any one building or land under this section as one property, he may, subject to any general conditions which may from time to time be pre-[397]scribed by the Standing Committee in this behalf, at any time, not later than seven days before the first day of any half-year for which an instalment of general tax will be leviable in respect of the said property, sanction a drawback of the one-fifth part of the general tax so leviable.

In pursuance of the above section the following notice was issued by the Municipal Commissioner:—

It is hereby notified that the Standing Committee of the Corporation has, under the provisions of section 158 (2) of the City of Bombay Municipal Act 1888, prescribed the following general conditions in supersession of those hitherto in force to be observed in granting allowances of one-fifth drawback of the general tax in respect of properties which are let to two or more persons in separate occupancies:

(1) Except with the special sanction of the Commissioner no claim for drawback shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half year to which such claim relates.

(2) Drawback of one-fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others, viz.:—

(a) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods.

(b) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which any trade or manufacture is carried on, or any goods are sold.

Applicants for drawback should see the Assessment Department Ward Superintendents, at their respective Ward Offices, with reference to the second condition prescribed by the Standing Committee

Macpherson, for Plaintiff
for Defendant

Sargent, C J —We agree with the Judge of the Small Cause Court that the second and third of the conditions prescribed by the Standing Committee under the provisions of section 158 clause (2), are not *ultra vires*, and justify the Commissioner in refusal of the drawback. The practical effect of them is doubtless to confine the right to drawback to buildings let on a particular class of holding, but, if the Legislature had intended to exclude conditions in any way restrictive of that right,—and by prescribing conditions nothing more was meant, as was suggested, than to lay down rules as to the time and manner of [398] claiming the right to drawback,—we should have expected different language.

Moreover, the position of the sentence in the section, coming as it does immediately after the mention of the particular description of buildings, points to the conclusion that by the term 'conditions' was contemplated a possible qualification or restriction affecting the nature or extent of the holdings already referred to. The Standing Committee, which is a select portion of the Councilors, might well be expected to exercise a sound discretion in deciding upon the necessary conditions. We may remark that the several buildings in question, although deprived of the right to drawback by the conditions, will still be entitled to a refund when the entries are such as to fall under the provision of section 175.

Costs of this reference to be costs in the municipal appeal, and to be taxed by the Taxing Officer of the High Court as on the Original Side of the High Court.
Attorneys for Plaintiff —Messrs *Little, Smith, Nicholson and Bowen*

Attorneys for the Defendant —Messrs *Crawford, Burder, Buckland and Bayley*

[17 Bom 398]

APPELLATE CIVIL

The 22nd February, 1892

PRESENT

MR JUSTICE JARDINE AND MR JUSTICE TELANG

Manilal . . . (Original Defendant) Appellant
versus

Bai Tara . . . (Original Plaintiff) Respondent *

Hindu law—Widow—Widow's right of residence in her husband's house after his death—House mortgaged by plaintiff's husband in his lifetime and sold in execution—Auction purchaser—Notice of widow's claim to reside

In execution of a decree upon a mortgage effected by the plaintiff's husband in his life-time, the house in dispute was put up to auction and purchased by the defendant. The

** Second Appeal, No 790 of 1891

defendant was aware that the plaintiff (the mortgagor's widow) was residing in the house at the time of the Court sale. In a suit brought by the plaintiff to establish her right to reside in the house in question,

Held, that in the absence of any allegation that the mortgage effected by the plaintiff's husband was not for the benefit of the family, or was in any way in [399] fraud of the plaintiff's rights, the defendant as auction-purchaser took the house free from the plaintiff's right of residence as a Hindu widow, notwithstanding the fact that he had notice of her claim.

SECOND APPEAL from the decision of J. B. Alcock, District Judge of Surat, in Appeal No. 64 of 1891 of the District File.

The plaintiff, Bai Tara, was the widow of one Nandlal Baharilal. In execution of a decree upon a mortgage effected by Nandlal and his son the house in dispute was put up to auction and purchased by the defendant.

The plaintiff thereupon sued for a declaration of her right of residence, as a Hindu widow, in the house in dispute, and for an injunction restraining the auction-purchaser from ousting her.

The Court of First Instance rejected the plaintiff's claim.

On appeal, the District Judge found that the auction-purchaser had notice of the fact that the plaintiff was residing, and had a right to reside, in the house in dispute, and that the plaintiff could not be provided with a residence in any other family property. He, therefore, awarded the plaintiff's claim, on the authority of *Dalsukhram v. Lallubhai*, I. L. R., 7 Bom., 282.

Against this decision the defendant appealed to the High Court.

Manekshah Jahangirshah, for Appellant.

Nagindas Tulsidas, for Respondent.

The following authorities were referred to in argument:—*Nana Jivan v. Rama*, P. J., 1886, p. 252; *Ramanadan v. Rangammal*, I. L. R., 12 Mad., 260; *Lakshman v. Satyabhamabai*, I. L. R., 2 Bom., 494, at pp. 511, 514, 520; *Gauri v. Chandramani*, I. L. R., 1 All., 262; *Talemand Singh v. Rukmina*, I. L. R., 3 All., 353; *Srimati Bhagabati v. Kanarlal*, 8 B. L. R., 225; *Dalsukhram v. Lallubhai*, I. L. R., 7 Bom., 282.

Jardine, J.:—It is found below that the defendant, who represents the purchaser at the Court sale held under the decree obtained on the mortgage by the mortgagee against the plaintiff's husband, had notice of the plaintiff's claim to reside in the house then sold and in which she was then residing. But, in the absence [400] of any allegation that the mortgage effected by the plaintiff's husband was not for the family advantage, or was in any way in fraud of her rights, we are of opinion that the purchaser at the Court sale took the house free from her right of residence as a Hindu widow. This appears to have been decided by this Court in *Nana Jivan v. Rama*, P. J., 1886, p. 252, and at Madras in *Ramanadan v. Rangammal*, I. L. R., 12 Mad., 260. The subject is also discussed in *Lakshman v. Satyabhamabai*, I. L. R., 2 Bom., 494, at pp. 511, 514, 580, and in *Dalsukhram v. Lallubhai*, I. L. R., 7 Bom., 282.

For these reasons we reverse the decree of the District Judge and restore that of the Subordinate Judge. Plaintiff to pay costs of both appeals.

Decree reversed.

NOTES.

[See also (1902) 27 Mad. 45 (1907) P. R., 36.]

APPELLATE CIVIL.

The 10th March, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

Bai Ugri and others.....(Original Defendants) Appellants

versus

Patel Purshottam Bhudar.....(Original Plaintiff) Respondent.*

Husband and wife — Marriage — Restitution of conjugal rights — Conditional marriage — Kudwa Kunbi caste — Custom — Public policy.

The plaintiff, a member of the Kudwa Kunbi caste, sued in 1890 for restitution of conjugal rights, alleging that he had been married to the first defendant in 1927. The defendants alleged that at the date of the marriage the parties were only a month old; that the marriage was a *sata* (exchange) marriage, and that by the contract the plaintiff's father was bound, as a condition of his obtaining the second defendant's daughter for his son, to provide a girl to be married to the second defendant's son. They alleged that such conditional marriages were a custom of the caste, and they denied that the condition had been performed by the plaintiff's father. They further alleged that in 1936 the plaintiff's father, finding that he could not perform the condition, had passed a release (the plaintiff himself then being a minor) to defendant No. 2 (the father of defendant No. 1) giving up all claims to defendant No. 1; that a dispute having subsequently arisen after the plaintiff had attained his majority the matter was referred to the members of the caste, who decided that within a certain fixed time the plaintiff should provide a girl for the son of defendant No. 2, and that on the plaintiff failing to do so the marriage was dissolved. The Court found that by the custom of the caste the marriage in 1927 between the plaintiff and defendant No. 1 was only a conditional marriage; that the release of 1936 operated to cancel the marriage, and that in any case the plaintiff's failure to find a girl for the second defendant's son, in accordance with the decision of the caste, dissolved the marriage.

[401] *Held*, that the plaintiff had not established his right to the restitution of defendant No. 1 as his wife. The alleged custom was not contrary to public policy. According to the custom relied on there was no complete and binding marriage within the intention of the parents of the parties although the ordinary religious ceremonies were performed. Such a transaction could not be regarded as immoral from any point of view.

The Hindu law leaves it entirely to the parents to marry their daughters, and although, according to strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognise a custom, at any rate among the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still regarded by the parents on both sides as incomplete and conditional marriages.

THIS was a second appeal from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad with appellate powers.

Stit for restitution of conjugal rights. Defendant No. 1 was the daughter of the second defendant, and the plaintiff alleged that he was married to defendant No. 1 in 1927 (1871-72) by a *sata* (exchange) contract of marriage. By this contract he received defendant No. 1 in marriage from her father (defendant No. 2) and in return his (the plaintiff's) father was to provide a girl to be given in marriage to the son of defendant No. 2. The plaintiff further stated that in accordance with this twofold contract the son of defendant No. 2 was married

to a girl provided by the plaintiff's father, and the plaintiff was married to defendant No. 1.

The girl married to the son of defendant No. 2 died soon after the marriage, and thereupon defendant No. 2 refused to send his daughter, (defendant No. 1,) to the house of her husband (the plaintiff) unless another girl was provided by his (plaintiff's) father for the defendant's son. The dispute was referred to the members of the caste in *Samvat* 1942 (A. D. 1886-87), and they decided that the plaintiff within a certain time should offer another girl to defendant No. 2 for his son, and that when the offer was made defendant No. 2 should pay Rs. 125 to the plaintiff, and should send defendant No. 1 to his house. The plaintiff complained that, as required, he had offered a girl to defendant No. 2, who had, however, refused to accept her, and had also refused to pay the Rs. 125 and to send defendant No. 1 to his house. The plaintiff accordingly filed this suit. The first defendant had been [402] given in marriage by her father (defendant No. 2) to the third defendant.

For the defence it was alleged that the plaintiff and the first defendant were married in *Samvat* 1927, when they were only a month old; that the contract of marriage was twofold; that no girl had ever been offered by the plaintiff's father to the second defendant for marriage to his son; that as the plaintiff's father had not performed, and could not perform, his part of the contract, he, in *Samvat* 1936 (1880-81 A.D.), had given a release, (the plaintiff then being a minor) to the second defendant, stating therein that he had no longer any claim on the first defendant; that the plaintiff, however, when he came of age, claimed possession of the first defendant; that the matter was, therefore, referred to arbitrators in *Samvat* 1942 (A.D. 1886-87), who decided that the plaintiff should offer a girl within a certain time to the second defendant and then take away the first defendant to his house; but that, in case the plaintiff should fail to do this within the time, the second defendant should be at liberty to give the first defendant in marriage to any other person. The defendants alleged that the plaintiff had failed to perform his part under this award, and that thereupon the first defendant had been given in marriage to the third defendant.

The Subordinate Judge rejected the plaintiff's claim. In his judgment he said: "It appears that *bekhla*, *tekhla* and *chokhla* (i. e. double, treble and quadruple contracts) are common among Kunbis in the district, and those of moderate means seem to indulge most in such contracts. This may perhaps be due to the scarcity of girls. And as marriages take place every nine, ten or twelve years, child marriages are very common, but the married girls are sent to their husbands' houses only when they become of marriageable age, and several circumstances sometimes take place before the girl reaches her marriageable age to be sent to her husband's house, which bring about annulment of the marriage contract. . . . The defendant No. 1 has never gone or has never been sent to the plaintiff's house. They have hitherto never lived as husband and wife. Since her marriage with defendant No. 3, the defendant No. 1 has been living in his house as his wife. Under such circumstances I think that the plaintiff is not entitled to recover possession of the defendant No. 1 to live with him as his wife.

[403] "It seems to me that until the girls reach their marriageable age among Kunbis, child marriages in them are more like betrothal and less like *pakka* marriages, especially when such marriages are effected according to the double, treble and quadruple contract arrangement."

In appeal, the Court reversed the decree. The defendants thereupon preferred a second appeal.

Govardhanram M. Tripathi, for the Appellants:—The plaintiff is not entitled to a decree for restitution of conjugal rights. His marriage was a conditional one, and as the conditions were not fulfilled, the marriage was never completed. These conditional marriages are a custom among the Kudwa Kunbi caste to which the parties belong. The custom is not immoral or opposed to public policy—*In the matter of Chamia*, 7 Cal. L. R., 354. Such a marriage is called Asura, and is only an inchoate one.

Ganpat Sadashiv Rao, for the Respondent.—The marriage in this case does not fall within the class of marriages called Asura. A marriage is complete as soon as the requisite ceremonies are performed, and it cannot then be set aside. Where a marriage is made subject to a condition, a Court should uphold the marriage and set aside the condition—*Seetaram, alias Kerra Heera v. Mussamut Aheeree Heeranee*, 2 W. R., 49. The essential condition of the marriage in the Asura form is the payment of money. But the validity of a marriage is not affected by failure of a contract to pay money—*Steele's Hindu Law and Custom*, page 166. The Hindu law regards marriage as an indissoluble tie—*West and Bühler*, (3rd Ed), page 90. A custom dissolving marriage is immoral and should not be given effect to—*Mathura Naikm v. Esu Naikm*, I. L. R., 4 Bom., 545. The custom of providing a wife for the son of a man whose daughter is married, cannot be supported on the ground of public policy.

At this stage of the case the Court recorded the following interlocutory judgment:—

[404] 1891, September 28. **Sargent, C.J.**—The judgment of the lower Court of appeal shows that the Subordinate Judge, A. P., assumes that the plaintiff was validly married to defendant No. 1, and upon that assumption he holds that a custom of the caste "for the father to divorce his son's wife, although the son was a minor, was immoral and contrary to public policy." But it appears to us that a doubt necessarily arises as to the effect of a *sata* (exchange) marriage, as contracted according to the custom of the caste; for it is needless to say that such a contract of marriage is not known to the strict Hindu law. In other words, it has to be determined whether, according to the custom of the caste, what took place in *Samvat* 1927 constituted a complete valid marriage between the plaintiff and defendant No. 1 or whether the marriage remained inchoate or conditional upon the performance by the plaintiff's father of his part of the bargain, *viz.*, "to offer a girl to defendant No. 2 for marriage with his son."

Before disposing of the case on considerations arising out of public policy we think it is advisable that issues should be raised for determining the above question, and also whether by the custom of the caste the father could cancel what had been done in *Samvat* 1927 so as to bind the plaintiff. We must therefore, send back the case for a finding on the following issues:—

1. Whether by the custom of the caste what took place in 1927 constituted a complete and unconditional marriage between plaintiff and the first defendant?
2. Whether the plaintiff's father by the custom of the caste could cancel what took place in 1927 so as to bind him?

The finding on the issues to be sent to this Court within three months. Parties to be allowed to give fresh evidence.

The findings of the Subordinate Judge on both the issues were in the affirmative. In his reasons for the findings, however, he stated that the marriage was complete, in the sense that all the necessary ceremonies were gone through, but that the custom of conditional marriage relied on by the appellant was proved.

The case then came again before the High Court.

[405] (SARGENT, C. J. :—Now the only question before us is whether we can recognize the custom.)

Ganpat Sadashiv Rao for the Respondent (plaintiff) :—We rely upon the rulings in *Uji v. Hathu Lahu*, 7 Bom. H. C. Rep., A. C. J., 133; *Reg. v. Karsan Goja*; *Reg. v. Bai Rupa*, 2 Bom. H. C. Rep., 117, and *Reg. v. Sambhu Raghu*, I. L. R., 1 Bom., 347. The custom alleged is opposed to public morals and is also repugnant to the spirit of the Hindu law. The utmost that the caste could do was to inflict a fine upon the defaulting party for his failure to perform his part of the contract.

Govardhanram M. Tripathi for the Appellants. — According to the custom in dispute, a marriage is not allowed to be consummated, though all the necessary religious ceremonies are performed, till the husband has performed his part of the contract. It is not, therefore, complete. The performance of the ceremonies amounts to nothing more than betrothal. Therefore the custom cannot be treated as immoral or opposed to public policy, and, therefore, it should be recognized—*Boolechand Kollta v. Janokee*, 25 W. R., 386.

Sargent, C. J. :—The findings on the issues sent down by this Court on 28th September 1891, are, when read together, to the effect that although the usual religious ceremonies were performed on the occasion, what took place in *Samvat* 1927 constituted, by the custom of the caste, only a conditional marriage between plaintiff and defendant No. 1; that the *farkhat*, passed by the father in *Samvat* 1936, and which was signed by the plaintiff, operated to cancel the marriage, but that, in any case, a dispute having arisen out of the said *farkhat*, the decision of the Panch that plaintiff should find a girl to be married to a male member of the family of defendant No. 2 was binding on him, and that the plaintiff's default in doing so dissolved the marriage.

It has, however, been contended that the Court ought not to recognize such a custom as being contrary to public policy. The cases which have been referred to, viz., *Reg. v. Karsan Goja*; *Reg. v. Bai Rupa*, 2 Bom. H. C. Rep., 117; *Uji v. Hathu Lahu*, 7 Bom. H. C. Rep., A. C. J., 133; and *Reg. v. Sambhu Raghu*, I. L. R., 1 Bom., 347, all turn upon caste customs by which a woman is enabled to leave her husband and marry another man of her own free will, or with the consent of the caste, and which the Court held to be invalid on the ground that they were immoral as "legalizing adultery." The question here is of an entirely different nature; as, according to the custom relied on, there is no complete and binding marriage within the intention of the parents of the parties, although the ordinary religious ceremonies (presumably those usual amongst Sudras) are performed. Such a transaction as took place in *Samvat* 1927 cannot, in our opinion, be regarded as immoral from any point of view. The parties are in all cases, according to the practice of the caste, of very tender years when such marriages are contracted. The Hindu law leaves it entirely to the parents to marry their daughters, and although, according to strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognize a custom, at any rate amongst the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still regarded by the parents on both sides as incomplete and conditional marriages. In the case of *Boolechand Kollta v. Janokee*, 25 W. R., 386, which was a suit like the present for restitution of conjugal rights, the Calcutta High Court gave effect to a caste custom by which the usual ceremony of marriage was not regarded as binding unless a second ceremony was performed prior to the woman coming to maturity and

cohabiting with her husband, and by which, in default of such ceremony, the woman might, after puberty, as the defendant in that case had done, marry another man.

Upon the whole, we are of opinion that there is no reason for not recognizing the custom, as proved in this case, and, therefore, whether upon the ground of the *furkhat* passed by the plaintiff's father or of the plaintiff's default in performing the condition imposed on him by the Panch, we must hold that the plaintiff has not established his right to the restitution of the defendant No. 1 as his wife, and must, therefore, reverse the decree of the Court below and dismiss the plaint, with costs throughout on plaintiff.

Decree reversed.

[407] APPELLATE CIVIL.

The 19th April, 1892.

PRESENT.

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRDWOOD.

The Secretary of State for India.....(Original Defendant) Appellant
versus

Sheth Jeshingbhai Hathising
and others.....(Original Plaintiffs) Respondents.*

Land revenue -Bombay Summary Settlement Act VII of 1863--Settlement under that Act is an agreement and subject to the law of contracts--Settlement made and sanad issued under a mistake--Quit-rent paid by inamdars to Government under such settlement--Refund--Void agreement--Contract Act (IX of 1872), Secs. 20 and 65--Sanad--Meaning and effect of.

Under the Bombay Summary Settlement Act VII of 1863, a settlement in respect of the village of Mankol was effected, in 1864, between the Government and the plaintiffs, who were the *inamdars*, and a *sanad* was granted to the plaintiffs, under the terms of which a certain yearly quit-rent was payable by them to Government in respect of the said village. At the time of the settlement the plaintiffs believed that they were the superior holders of all the lands in the village, including certain *wanta* lands. It subsequently appeared, however, that the *wanta* lands were the property of certain *grassias*, who were in possession as owners, and that the plaintiffs were not the holders of these lands within the meaning of section 32 of Act VII of 1863. The Government, however, required the plaintiffs to pay the entire quit-rent of the village for the *Samvat* years 1939-1940, as fixed by the *sanad*. The plaintiffs paid under protest and brought this suit to recover the amount (Rs. 400-12-6) paid in respect of the *wanta* lands.

* Appeal, No. 95 of 1890.

Held, that the plaintiffs were entitled to a refund of the quit-rent paid in respect of the *wanta* lands.

A settlement under Act VII of 1863 (Bombay) is an agreement effected by proposal and acceptance (see section 2), and is subject to the ordinary rules applicable to contracts. Here both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. There was, therefore, a common mistake as to a matter of fact which both parties must have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. Such a mistake under section 20* of the Contract Act (IX of 1872) renders the agreement void. The settlement as to the *wanta* lands might be treated as distinct from that which applied to the remaining lands of the village, the former being void, and the plaintiffs being, therefore, entitled to a refund of the quit-rent paid in respect of such lands under section 65 of the Contract Act.

A *sanad* issued under Act VII of 1863 merely declares what by section 6 of the Act is stated to be the effect of the settlement to which both the Government [408] and the holders of the land have consented; but it is by virtue of the settlement itself, as provided by the Act, that Government are entitled to demand payment of such rent.

SUIT to recover quit-rent paid under protest by the plaintiffs to Government in respect of certain *wanta* lands for the *Samvat* years 1939 and 1940, and for a declaration, &c., that the defendant was not entitled to levy a quit-rent on the *wanta*.

The said lands were situate in the village of Mankol, of which the plaintiffs were the *inamdars*. The plaintiffs alleged that under the Bombay Summary Settlement Act VII of 1863 a settlement was effected in 1864 between them and the Government in respect of all the lands in the village, including the *wanta* lands; that at the time of this settlement they *bona fide* believed that they were the superior holders of the *wanta* lands as well as of the rest; and both parties being under that impression the amount of quit-rent was then fixed and a *sanad* was granted to them by Government. Certain *girassias* being in possession of the *wanta* lands the plaintiffs subsequently brought a suit against them to compel them to contribute to the quit-rent leviable on the village under the settlement. In that suit, however, the plaintiffs failed, the Court holding that, at the time of the settlement, the *girassias* were the owners of the lands, and that they were not liable, not having been parties to the settlement of 1864.

The plaintiffs were subsequently required by Government to pay the quit-rent for the entire village, including the *wanta* lands, for the years 1939 and 1940 as fixed by the settlement of 1864. They paid it under protest, and now brought this suit to recover the amount (Rs. 400-12-6) paid in respect of the *wanta* lands, and for a declaration that they were not liable to pay in respect of the said *wanta* lands.

The defendant contended that the plaintiffs were liable to the whole rent until the *sanad* of 1864 was cancelled. It was stated that the Government was willing to issue a fresh *sanad* on the joint application of the plaintiffs and the *girassias*, or on the plaintiffs obtaining a decree showing their exact share of the village.

Agreement void where both parties are under mistake as to matter of fact. * [Sec. 20:—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement too is void.]

Explanation:—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.]

[409] The District Judge rejected the claim, holding that it was not cognizable by the Court under section 28[†] of the Bombay Summary Settlement Act VII of 1863.

On appeal to the High Court the case was remanded to be disposed of on the merits (see Printed Judgments for 1889, p. 82). " "

On remand the District Court passed a decree for the plaintiffs, awarding the claim in full, and making the declaration prayed for.

The defendant appealed to the High Court.

Rao Sahib Vasudeo J. Kirtikar, (Government Pleader), for Appellant (defendant) :—On the plaintiffs' (respondents') representation of the facts, *viz.*, that they were the registered holders of all the lands in the village, the Government granted them a *sanad*, which has been acted on for more than fifteen years. They are, therefore, now estopped from objecting to it, and the mistake cannot be relieved against—Story on Equity, para. 151. The *girassias* ought to have been joined in this suit. They hold a third share of the village.

The Government has been willing to grant a fresh *sanad*, but this could only be done with the assistance of the plaintiffs, who are the *inamdars*, and they would not join except on conditions which Government could not admit. Until the dispute between the plaintiffs (respondents) and the *girassias* is settled, the Government can do nothing—*Dolsang v. The Collector of Kaira*, I. L. R., 4 Bom., 367. The plaintiffs are in the position of trustees for the *girassias*. They, therefore, cannot seek to set aside the *sanad* without the consent of the *girassias*.

Govardhandas M. Tripathi for Respondents (plaintiffs) :—The plaintiffs are willing to take a separate *sanad*, and have offered [410] to do so, but Government require them to apply jointly with the *girassias*.

Under the Bombay Summary Settlement Act VII of 1863 Government cannot grant a *sanad* without the holder's consent. The term "holder" is defined by section 32, cl (f) †. The plaintiffs are not the holders of the land in the possession of the *girassias*, and the plaintiffs' *sanad*, which relates to that land, is *ultra vires*.

At the time of granting the *sanad* both the Government and the plaintiffs believed that the plaintiffs were the holders of the *wanta* lands. This was a mistake. The *sanad* is, therefore, void—section 20 of the Indian Contract (Act IX of 1872). See also sections 65 and 70, Pollock on Contracts, (5th Ed.), p. 418. The *sanad* being void the question of estoppel cannot arise—*Bingham v. Bingham*, 1 Ves. Sen., 126.

[SARGENT, C. J., referred to *Jones v. Clifford*, 3 Ch. D., 779.]

Rao Sahib Vasudeo J. Kirtikar in reply :—There was no mistake on the part of Government. The plaintiffs represented the facts to Government, and the *sanad* was granted. The mistake of one party does not make a contract void.

* Section 28 of Bombay Act VII of 1863 :—When any settlement of a claim or claims to total or partial exemption from land revenue has been made by the Governor in Council or any duly authorized officer of Government under this Act, any appeal from or against the proceedings, orders or acts of the officers of Government engaged in making any such settlement shall be made to the Governor in Council, or to such officer or officers as may be appointed by the Governor in Council to take cognizance of such appeals, and shall not be cognizable by any other authority.

† Section 32, clause (f).—For the purposes of this Act the word "holder" shall be taken to signify the person who by himself, his tenants, sub-tenants or agents is in possession of the land held wholly or partially exempt from land revenue assessment, and shall include a mortgagee in possession as aforesaid. The committee, manager or trustee of any temple, who may be in possession of such lands, shall be considered the holder thereof.

Sargent, C. J. :—The plaintiffs seek to recover from Government the quit-rent paid to Government (under protest) for the *Samvat* years 1939 and 1940 in respect of certain *wanta* lands in the village of Mankol, of which the plaintiffs are *inamdars*, and which lands are admittedly in the occupation of the *girassias*, and also for a declaration that the defendant is not entitled to levy a quit-rent on the *wanta*.

The lands in question were included in a settlement effected between the plaintiffs and Government in 1864, in respect of all the lands in the village, under the Bombay Summary Settlement Act, VII of 1863. The case for the plaintiffs is that the settle-[411]ment was effected on the assumption that they were the holders of all the lands in the village, whereas the *girassias* were then and are now in possession of the *wanta* lands as owners, as subsequently determined by this Court in *Jesinghbai v. Hataji*, I. L. R., 4 Bom., 79. The judgment of this Court in the suit brought by the plaintiffs against the *girassias* to compel them to contribute to the quit-rent leviable on the village lands under the settlement is doubtless conclusive as between the plaintiffs and the *girassias*, that the *wanta* lands in the village were the property of the latter at the time of the settlement; and no attempt has been made in this suit by Government to dispute the correctness of that decision. We must, therefore, in this state of the evidence, regard it as settled that, neither at the time of the settlement, nor when the payments to Government in question were made, were the plaintiffs the "holders" of those lands within the meaning of section 32(f) of the Summary Settlement Act, VII of 1863, or indeed of the *sanad* itself, which was the result of that settlement.

The plaintiffs' case is that, at the time of the settlement, they *bona fide* believed themselves to be the superior holders of the *wanta* lands, and entered into settlement under that belief. The question is whether, having under that impression settled with Government for the payment of a certain quit-rent in respect of all the lands in the village, they are now entitled to any and what relief. It appears that, on the discovery by the plaintiffs that they were not the superior holders of the *wanta* lands, they applied to Government to have the *sanad*, which relates to all the lands in the village, amended; and this the Government assented to, provided the plaintiffs and *girassias* joined in their application, or on plaintiffs' obtaining a decree as to their exact share in the village; and such is the answer which they now, by their written statement, make to the present plaint, contending at the same time that, until such amendment is made, the plaintiffs are liable for the entire quit-rent. With respect to this latter objection to the plaint, it is to be remarked that the *sanad* merely declares what, by section 6 of the Act, is stated to be the effect of the settlement, to which both the Gov-[412]ernment and the holders of the land have consented. But it is by virtue of the settlement itself, as provided by the Act, that the Government are entitled to demand payment of the quit-rent; and the present question, therefore, as to the right of Government, under the circumstances of the case, to insist upon the entire quit-rent as settled in respect of all the lands in the village, is one to be determined quite independently of the *sanad*; and we agree, therefore, with the Joint Judge that this suit will lie although the *sanad* may not have been amended.

We may here remark that the provision in section 28 of the Act VII of 1863, which precludes a Civil Court from questioning a settlement made under the Act, so far as regards the right of the Government to levy from the holder for the time being of the lands the annual quit-rent fixed by section 6, is repealed by Act X of 1876; and the present suit is not included in the suits over which the jurisdiction of the Civil Court is taken away by section 4 of that Act.

Now, it is to be remarked that what is termed a settlement in the Act, as made by Government with the holder of land, arises from the acceptance by the holder, as stated in section 2, of the terms and conditions offered by Government, as set out in section 6. In other words, it is an agreement effected by proposal and acceptance and subject to the ordinary rules applicable to contracts. In the present case we see no reason to doubt that both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. They were the registered holders in the Government books, and the subsequent conduct of the plaintiffs and more especially the suit they brought against the *girassias* shows that they regarded themselves as being entitled as such holders. Both parties, therefore, engaged in the settlement under a common mistake as to a matter of fact which they must both have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. For there is not a particle of evidence to show that they intended to contract on any other basis. Such a mistake by section 20 of the Contract Act (IX of 1872) renders the [413] agreement void. Here, doubtless, it affects only a portion of the subject-matter of the contract, *viz.*, the *wanta* lands; but, looking at the nature of the contract, the object of which was to settle in a summary manner claims to exemption from payment of assessment on lands on payment of a quit-rent, assessed on the lands at a uniform rate, as provided by section 6, the settlement as regards the *wanta* lands may be treated as distinct from that which applies to the remaining lands in the village; and we arrive at the conclusion that the plaintiffs were entitled to contend that the settlement was void as regards the *wanta* lands, and that, as provided by section 65 of the Contract Act, they were entitled to a refund of the quit-rent paid in respect of such lands. It is plain, however, that the amount of the refund must depend on the extent of the *wanta* lands, which cannot be ascertained, so as to bind the Government, in the absence of the *girassias*. The third and fifth issues could not, therefore, be determined in this suit without making the *girassias* parties.

We must, therefore, reverse the decree and send back the case for a fresh decision with due regard to the above remarks, after making the *girassias* parties and recording fresh findings on issues third and fifth. The parties to pay their own costs of this appeal.

Decree reversed and case sent back.

NOTES.

[A contract may be established between the Government and the subject —25 Bom., 714.]

[17 Bom. 413]
APPELLATE CIVIL.

The 4th July, 1892.

PRESENT :

MR. JUSTICE BAYLEY, ACTING CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Kasturchand Bahiravdas and others.....(Original Defendants) Appellants
versus

Sagarmal Shriram and another.....(Original Plaintiffs) Respondents.*

*Parties—Partnership—Non-joinder—Suit in name of a firm by its manager—
Addition of name of other partner as co-plaintiff—Misdescription of plaintiff—
Civil Procedure Code (Act XIV of 1882), Sec. 27—Amendment of plaint—
Limitation—Limitation Act (XV of 1877), Sec. 22—Practice—Procedure.*

In this suit, which was brought to recover a debt due to the firm of Kondanmal Sagarmal, the plaintiff was described as "the firm of K. S. by its manager S. S." The defendants objected that one Malamchand was a partner in the firm and should [414] be a party to the suit. He was accordingly joined as a co-plaintiff on the 27th January 1888. The defendants then contended that the suit was time-barred under section 22 of the Limitation Act (XV of 1877).

Held, that the case was one of misdescription and not of non-joinder, for the action was brought in the name of the firm by its manager. The order of the words in the vernacular plaint showed that Sagarmal, the manager, did not sue in his own name. The defendants were entitled to have the name of the other partner disclosed, but it being found as a fact that Sagarmal was entitled to sue for the firm, the addition of Malamchand's name on the record came within the provisions of section 27 of the Civil Procedure Code (Act XIV of 1882).

SECOND APPEAL from the decision of M. H. Scott, District Judge of Satara.

This was an action brought to recover a debt due to the firm of Kondanmal Sagarmal. The suit was filed on the 21st November 1884, upon a document dated 1st December 1881. In the plaint the plaintiff was described as "the firm of Kondanmal Sagarmal by its manager Sagarmal Shriram."

The defendants objected (*inter alia*) that the plaint did not disclose the names of all the partners in the firm of Kondanmal Sagarmal.

The Subordinate Judge found that one Malamchand was a partner with Sagarmal in the firm of Kondanmal Sagarmal, and that he should have been a party to the suit. On this ground he dismissed the suit under section 32 of the Civil Procedure Code (Act XIV of 1882) without going into the merits of the case.

On appeal the District Judge (C. G. W. Macpherson) reversed the decree, and remanded the case for decision on the merits, being of opinion—(a) "That the question whether Sagarmal was entitled to sue for the firm must be determined on the evidence." (b) "That, if Sagarmal was not entitled to sue for the firm, Malamchand should be brought on the record, so that the suit be disposed of on the merits."

The order of the District Judge was confirmed by the High Court in Appeal No. 58 of 1887.

In accordance with the above order, Malamchand was joined as a co-plaintiff on the 27th January 1888. The defendants contended that the suit was then time-barred.

* Second Appeal, No. 759 of 1890.

[416] The Subordinate Judge found that the plaintiff Sagarmal could sue in his own name for the partners of the firm, and that the suit was not time-barred, and allowed the claim.

In appeal, the District Judge confirmed the decree.

From that decision defendants preferred this second appeal.

Phirozshah M. Mehta (with *Mahadeo Chimnaji Apte*) for the Appellants (defendants):—The suit was instituted by Sagarmal alone on the 21st November 1884, on a document dated 1st December 1881. Malamchand, who was a necessary party, was not joined till the 27th January 1888. The suit was then barred by limitation—*Kalidas Kevaldas v. Nathu Bhagvan*, I. L. R., 7 Bom., 217; *Balkrishna Moreswar Kunte v. The Municipality of Mahad*, I. L. R., 10 Bom., 32; *Hari Gopal v. Gokaldas Kushabashet*, I. L. R., 12 Bom., 158. A defendant may insist that every person interested in the subject-matter of the suit should be joined, and, if such person be not joined in time, the suit ought to be dismissed—*Ramdoyal v. Junmenjoy*, I. L. R., 14 Cal., 791.

The plaint as it was originally drawn did not comply with the provisions of section 50 of the Civil Procedure Code (Act XIV of 1882). We took the objection as to want of parties in our written statement before the first hearing. The respondent then took no steps to join Malamchand, and when he did so he was too late. Section 35 of the Civil Procedure Code provides for special cases. In all other cases the names of all persons interested as plaintiffs must be on the record. A firm cannot sue in its own name without specifically mentioning the names of all the partners.

Gajdar (with *Mahadeo Bhaskar Chavbal*) for the Respondents:—The only question involved in the case is whether the joinder of Malamchand was too late under the Limitation Act (XV of 1877). The suit was not brought by Sagarmal on his own behalf, or in his individual capacity, as manager; it was instituted in the name of the firm, and, therefore, there was no necessity to disclose the names of all the partners. It is nowhere laid down that a suit shall not be brought in the name of a firm. There is nothing in the Civil Procedure Code to prevent such a suit being filed. The suit being in the name of the firm, Malamchand was [416] impliedly a party to it, and it was not necessary to mention his name—*Lindley on Partnership*, (5th Ed.), page 265. The firm itself being the plaintiff, a partner in the firm cannot be called a co-plaintiff. He was joined in the suit as a co-manager. The cases cited were suits filed by managers in their individual capacity and not by the firm itself, as in the present case—*Manni Kasaundhan v. Crooke*, I. L. R., 2 All., 296; *Pragilal v. Maxwell*, I. L. R., 7 All., 284. The addition of Malamchand to the suit does not come within the provisions of section 22 of the Limitation Act—*Subodini Debi v. Cumar Ganoda Kant*, I. L. R., 14 Cal., 400. Assuming that the frame of the suit was not in accordance with the provisions of section 50 of the Civil Procedure Code (Act XIV of 1882), the Court can amend the plaint. This is a case merely of misdescription. One partner may bring a suit in the name of a firm—*Whitehead v. Hughes*, 2 Cr. & M., 318.

Phirozshah M. Mehta in reply:—Malamchand was not joined as a co-manager. The plaint shows that he was joined as co-plaintiff. *Subodini Debi v. Cumar Ganoda Kant Roy*, I. L. R., 14 Cal., 400, does not apply, because the real principals in that case were disclosed and the suit was brought by the authorized agent of those principals. The above ruling is at direct variance with the provisions of section 22 of the Limitation Act—*Starling on Limitation*, page 84; *Hari Gopal v. Gokuldas Kushabashet*, I. L. R., 12 Bom., 158. A suit may be brought by the partners in the name of a firm, but a firm alone cannot bring a suit without disclosing the partners.

Candy, J.:—The only argument urged in the present appeal is that the suit was barred by section 22 of the Limitation Act, (XV of 1877). We think, however, that this case must be distinguished from the numerous cases quoted at the Bar which establish the principle as to non-joinder of plaintiffs in actions of contract. The present was a case of misdescription, not of non-joinder. For the action was brought in the name of the firm by its manager: the manager did not sue in his own name; the order of the words in the vernacular plaint shows this. When then the defendants objected, as they were entitled to do, that [417] the name of the other partner in the firm should be disclosed, the Subordinate Judge was not justified in rejecting the suit under section 32. This was the view taken by the District Judge (Mr. Macpherson), which was confirmed on appeal. The case having been remanded, and the name of Malamchand having been brought on the record, the Subordinate Judge found as a fact that Sagarnal was entitled to sue for the firm, and that the addition of Malamchand's name came under the provisions of section 27, not of section 32. The District Judge (Mr. Scott) came to the same conclusion, and we think that he was right, and confirm the decree with costs.

Decree confirmed.

NOTES.

[This was followed in (1902) 27 Bom., 157; (1903) 7 C.W.N., 817; (1894) 18 Mad., 33; (1896) 20 Bom., 767; (1906) P.R., 127; (1907) P.R., 149; (1900) 3 O.C., 347; (1907) S.L.R., 191; see also (1897) 21 Bom., 580.]

[17 Bom. 417] APPELLATE CIVIL.

The 7th July, 1892.

PRESENT:

MR. JUSTICE BAYLEY, ACTING CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Tippanna.....Plaintiff
versus

• The Southern Maratha Railway Company.....Defendants.*

*Railway Company—Exemption from liability—Special contract—Risk note—
Railways Act (IX of 1890), Sec. 54, Cl. (1), Sec. 72, Cls. (a), (b), Sub-
cls. (2) and (3)—Carriers' Act, 1865.*

The plaintiff sued the defendants (a Railway Company) for damages for short delivery of goods consigned to him. The defendants pleaded a special contract signed by the consignor, which, in consideration of their carrying the goods at a special reduced rate instead of the ordinary tariff rate, exempted them from liability for loss or damage to the goods from any cause whatever before, during, and after transit over their railway or other railways working in connection therewith.

Held, that under the contract the defendants were not liable to the plaintiff.

THIS was a reference from Rao Sahab Vinayak Vitthal Tilak, Subordinate Judge of Bagalkot, in his Small Cause jurisdiction, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was as follows:—

"3. On the 21st April 1891, a certain man at Salem, (a station on the Madras Railway), consigned 230 bags of cocoanuts (each bag containing 100

* Civil Reference, No. 3 of 1892.

nuts) for delivery to plaintiff at Bagalkot [418] (a station on the Southern Maratha Railway). The two railways work in connection with each other. The defendants having delivered only 229 bags to the plaintiff, the latter has sued to recover damages (Rs. 4) for the short delivery.

"4. Under section 76* of the Railways Act (IX of 1890) it is not necessary for the plaintiff to prove how the loss of one bag was caused. Nor has the defendants produced any evidence on the point.

"5. The defendants rely on section 72† of the Railway Act and on * * the risk note † (Exhibit 7), which is [419] signed by the consignor and attested by witnesses. They contend that the special contract contained in the risk note exonerated them from all liability to damages.

"6. It is admitted that the risk note is in the form approved by the Governor in Council."

The Subordinate Judge referred the following question :—

"Can the defendant claim exemption from liability by reason of the special contract contained in the risk note?"

The opinion of the Subordinate Judge was in the negative, though he considered that the decision of the Calcutta High Court in *Moheshwar Das v. Carter*, I. L. R., 10 Cal., 210, supported the defendants' contention.

Daji Abaji Khare (*amicus curiæ*), for the Plaintiff, relied on *Chogemul v. The Commissioners for the Improvement of the Port of Calcutta*, I. L. R., 18 Cal., 427.

Mahadeo Bhaskar Chavhal (*amicus curiæ*), for the Defendants, relied on *Moheshwar Das v. Carter*, I. L. R., 10 Cal., 210.

Per CURIAM:—In this case the Subordinate Judge of Bagalkot has referred the following question :—Can the defendants claim exemption from liability by reason of the special contract contained in the risk note which the plaintiff

* Section 76 of the Indian Railways Act (IX of 1890) :—

In any suit against a railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused.

† Section 72 of the Indian Railways Act (IX of 1890) :—

(1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it—

(a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(b) is otherwise in a form approved by the Governor-General in Council.

(3) Nothing in the Common Law of England or in the Carriers' Act, 1865, regarding the responsibility of the common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration.

‡ Risk Note.

(To be used when the sender elects to despatch at a "special reduced" or "owner's risk" rate articles for which an alternative "ordinary" or "railway risk" rate is quoted in the tariff.)

Station. 21st April 1891.

Whereas the consignment of.....tendered by me as per forwarding order No. of this date, for despatch by the Madras Railway to station, and for which I have received railway receipt No. of the same date, is charged at a special reduced rate instead of at ordinary tariff rate chargeable for.....I, the undersigned, do in consideration of such lower charge agree and undertake to hold the said railway harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the said consignment from any cause whatever before, during, and after transit over the said railway or other railway lines working in connection therewith.

has signed? His opinion was in the negative. The risk note, as the Subordinate Judge states in paragraph 6 of his reference, is admittedly in the form approved of by the Governor General in Council.

This case comes within the Railways Act (IX of 1890). By section 54 *, clause (1) of that Act, subject to the control of the Governor General in Council, a railway administration may impose conditions not inconsistent with the Act or with any [420] general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods. By section 72, sub-clause (2), an agreement purporting to limit the responsibility of a railway administration for the loss of goods delivered to be carried by railway shall, in so far as it purports to effect such limitation, be void unless it (a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the goods, and (b) is otherwise in a form approved by the Governor General in Council. There is a further sub-clause (3) which is as follows:—"Nothing in the Common Law of England or in the Carriers' Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility, as in this section defined, of a railway administration."

Mr. Khare, who argued this case for the plaintiff, contended that there is something in the Common Law of India which will enable him to recover damages notwithstanding the terms of the risk note. In our opinion, as there is a risk note in this case signed by the plaintiff, which is in a form approved by the Governor General in Council, his contention must fail. This risk note says: "To be used when the sender elects to despatch at a 'special reduced' or 'owner's risk' rate articles for which an alternative 'ordinary' or 'railway risk' rate is quoted in the tariff." The risk note states that, whereas the consignment is charged at a special reduced rate instead of at ordinary tariff rate charged for the goods (230 bags of cocoanuts), the plaintiff does, in consideration of such lower charge, agree and undertake to hold the said railway harmless and free from all responsibility for any loss, destruction or deterioration or damage to the said consignment from any cause whatever before, during, or after transit over the said railway or other railway lines working in connection therewith. As pointed out by GARTH, C. J. (PRINSEP and WILSON, JJ., concurring) and by O'KINEALY, J., in *Moheswar Das v. Carter*, I. L. R., 10 Cal., 210, at p. 213, similar contracts have frequently been construed by English Courts and full effect has been given to their provisions. We cannot understand the doubts of the Subordinate [421] Judge, when, moreover, he had a ruling of the Calcutta High Court to guide him.

The recent decision of the Calcutta High Court in *Chogemul v. The Commissioners for the Improvement of the Port of Calcutta*, I. L. R., 18 Cal., 427; so strongly relied upon by Mr. Khare, has no application in the present case, as there was no special contract signed by or on behalf of the consignor of the goods. The present case turns upon the provisions of the risk note, which, in our opinion, shows that the defendants have a complete defence to this action.

Mr. Khare* further argued that, apart from the measure of the general responsibility of railways as defined by clause (1) of section 72, and the non-applicability thereto of the Common Law of England or of the Carriers' Act,

* Section 54 of the Indian Railways Act (IX of 1890) —

(1) Subject to the control of the Governor General in Council, a railway administration may impose conditions, not inconsistent with this Act, or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods.

(2) The railway administration shall keep at each station on its railway a copy of the conditions for the time being in force under sub-section (1) at the station, and shall allow any person to inspect it free of charge at all reasonable times.

1865, there was a Common Law of India untouched by the section, and that under that law defendants could not claim exemption by reason of the risk note. We are unaware of such a law. The Common Law, which came to govern the duties and liabilities of common carriers throughout India, was the Common Law of England (see remarks of Privy Council in *The Irrawaddy Flotilla Company v. Bugwandas*, I. L. R., 18 Cal., 620). The effect of that law as regards railways is restricted by section 72 of Act IX, 1890.

In answer, therefore, to the question referred by the Subordinate Judge we are of opinion that the defendants can claim exemption from liability by reason of the special contract contained in the risk note.

Order accordingly.

NOTES.

[This was followed in (1902) 30 Cal., 257; (1903) 14 M.L.J., 396; (1902) 5 O.C., 153; (1908) P. R., 113.]

[422] APPELLATE CIVIL.

The 20th July, 1892.

PRESENT:

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

The Secretary of State for India.....(Original Defendant) Appellant
versus

Balvant Ramchandra Natu.....(Original Plaintiff) Respondent.*

Local Funds Act (Bombay) III of 1869, Sec. 8—Local Fund cess

—Inamdar—Superior holder—Liability of inamdar to pay the cess.

An *inamdar* is a 'superior holder' within the definitions of Regulation XVII of 1827 and Bombay Acts I of 1865 and V of 1879. He is, therefore, the person primarily liable to pay the Local Fund cess under section 8 of Bombay Act III of 1869.

There is no provision of law entitling an *inamdar* to charge for his expenses in collecting the cess.

APPEAL from the decree of W. H. Crowe, District Judge of Poona, in Suit No. 12 of 1889.

The plaintiff was the *inamdar* of the village of Kudus. He sued to recover back the sum of Rs. 10 8-0 paid by him to the Collector under protest as the remuneration of the village officers for collecting the Local Fund cess in his *inam* village.

The defendant pleaded (*inter alia*) that the plaintiff as *inamdar* was liable to pay the cost of collecting the cess.

The District Judge held that the plaintiff was a superior holder, and as such was not liable, under Bombay Acts III of 1869 and V of 1879, to pay any remuneration to the village officers for collecting the cess. He, therefore, awarded the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Rao Sahib Vasudev J. Kirtikar, Government Pleader, for Appellant:—The provisions of sections 6, 7 and 8 of Bombay Act III of 1869 show that the

* Appeal No. 91 of 1890.

Local Fund cess falls, in the first place, on the *inamdar*, who is a superior holder. He is, therefore, liable to pay the cost of collecting the cess. Under section 136 of the Bombay Land Revenue Code, the superior holder is primarily responsible for the land revenue, and he is entitled, under section 86 [423] of the Code, to receive assistance from the revenue authorities in recovering the revenue from the inferior holders. When he is entitled to this benefit, it is but fair that he should pay all reasonable charges incidental to the collection of the revenue. Refers to *Ranga v. Suba Hegde*, I. L. R., 4 Bom., 473; *Ram Tukoji v. Gopal*, ante, p. 54.

Phirozeshah M. Mehta (with him *Mahadev C. Apte*) for Respondent. — The *inamdar* is not liable to pay the cess at all. The last clause of section 8 of Bombay Act III of 1869 shows that the tenants are liable for the cess. If they do not pay it, the landlord is entitled to the assistance of the village officers in recovering the cess from them: see sections 85 and 86 of the Bombay Land Revenue Code (Act V of 1879). Section 136 of the Code no doubt makes superior holders primarily responsible for the land revenue. But, as the *inamdar* pays no revenue, he cannot be called a superior holder. He is a mere intermediary of the Government, and as such is entitled to deduct the cost of collecting the cess from the total cess collected. Moreover, the village officers are bound to give assistance to the *inamdar*. They are agents of Government, and cannot claim any remuneration for the assistance they render.

Jardine, J. — In this case the plaintiff, who is the *inamdar* of a wholly alienated village, claims from the Government a sum of money which he paid to the village officers as remuneration for their collecting from the plaintiff's tenants the amount of the cess levied under Bombay Act III of 1869, section 8, last clause.

It is argued by Mr. Mehta, who appears for the plaintiff, that this cess does not fall upon the *inamdar* at all. But, in our opinion, sections 6 and 7 of the Act impose it, in the first instance, as a charge on the aggregate village assessment and thus upon the land. Section 8 requires that the cess be levied in the same manner and under the same provisions of law as the ordinary land revenue. The *inamdar* is a "superior holder" within the definitions of Regulation XVII of 1827, section 3, Bombay Act I of 1865, section 2, clause (k), and Bombay Act V of 1879, section 3, clause 13, and was under Regulation XVII of 1827, section 30, and is under Bombay Act V of 1879, section 136, [424] the person primarily responsible for the payment of land revenue. We think, therefore, section 8 of the Act of 1869 justifies the levy of the cess from him, and we may refer to *Ranga v. Suba Hegde*, I. L. R., 4 Bom., 473, and *Ram Tukoji v. Gopal*, ante, p. 54, as showing that this view has been accepted by this Court.

It is also contended that the plaintiff as a mere intermediary of the Government is entitled to charge for his expenses in collecting the cess. There is no provision of law so entitling him: and as he is primarily liable to pay the cess, we are not aware of any reason, equitable or otherwise, which would impose on the Government the burden of paying him any expenses which he may incur under the legislative permission to him to recover the amount of the cess for his own benefit from his tenants.

In support of the first contention Mr. Mehta argued that the last clause of section 8 of the Act of 1869, where the words "recovery of this cess" appear, shows that the Legislature intended the cess to fall in its first incidence on the tenants, and that the first clause of section 8 applied to the levy of the cess from them. But it is clear that this first clause refers to the cess described in sections 6 and 7; and this is not a cess leviable from under-tenants, but one leviable on the aggregate village assessment, and, therefore, from the *inamdar*, the superior holder. In the last clause of section 8 the words "recovery of this cess" really

mean "recovery of the *amount* of the cess described in sections 6 and 7." The Act does not deal with two sorts of cesses: what the landlord recovers from the tenant is not, in strict language, a cess.

Another argument used for the plaintiff is that the *inamdar* has a right to the unpaid services of the village officers in the collection of the cess from the tenants by virtue of section 8 of the Act of 1869 and the requirement of section 85 of the Revenue Code of 1879 that the payments of the tenants shall be made through the village officers and not otherwise. It is unnecessary for us to determine this question of law. If the plaintiff's contention is right, he might have refused the demand of the village [425] officers. They are not parties to this suit: and no order of the Collector has been shown us, nor any evidence from which we can infer that the payment to the village officers was made under compulsion used by the Collector.

For these reasons we reverse the decree of the District Court, and reject the plaintiff's claim with costs throughout.

Decree reversed.

NOTES.

[See also (1902) 26 Bom., 504 ; (1903) 28 Bom., 74.]

[17 Bom. 425]

APPELLATE CIVIL.

The 25th July, 1892.

PRESENT :

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Mahadaji.....(Original Defendant) Appellant

versus

Joti..(Original Plaintiff) Respondent.*

*Mortgage—Simple mortgage usufructuary—Right to have the property sold —
Distinct covenant to pay the principal—Possession in lieu of interest —
Sale to recover principal only—Construction.*

A merely usufructuary mortgage will confer no right to have the mortgaged property sold. But where there is a distinct covenant to pay the principal, and the land is security for the same, the intention of the parties is that the property should be sold. Such a transaction is a simple mortgage usufructuary, and carries with it the right to have the property sold in default of payment of the principal.

A mortgagee, who is entitled to possession in lieu of interest and who does not take possession, loses his right to interest, and cannot ask that the property be sold for default in payment of interest, the property being security for the principal only.

THIS was a second appeal from the decision of M. H. Scott, District Judge of Satara.

The plaintiff sought to recover from the defendant personally, and on his default from the mortgaged property, Rs. 1,000, (Rs. 500 principal and Rs. 500

* Second Appeal, No. 7 of 1891.

interest); due upon a mortgage-bond dated the 27th March 1873, which ran as follows :—

Bond for debt, the 14th of *Falgun Vadya, Shak 1794*—the cyclical year, name thereof being *Angira*—corresponding with the English year 1873. On this day the bond is given in writing to the creditor named *Rajashri Joti bin Raju Patil Yadav*, by caste *Maratha*, occupation agriculture * * inhabitant of *mauje Yeravle*, taluka *Karad*, as follows :—I have received from you this day principal Rs. 500 (five hundred) of the *Gadi Surat* currency. As for the interest of the said amount, I have given (the produce of) my own land which is in my [426] own enjoyment situate at *mauje Yeravle* * * called *Sarkari Dale Vihiriche*, Survey No. 22, (measuring) acres 1-31 and assessed at Rs. 9. The four boundaries thereof are * * *. (The produce of) the land as comprised within the above four boundaries I have given in liquidation of the interest on the said amount. Therefore, you are to receive interest on the said amount from the produce of the said land. You are to do all, (that is) bestow labour on the said land and to receive all the produce. You are to pay the Government assessment on the said land and to receive the interest. The period (fixed) for the (payment of the) amount is five years from the date of the bond, within which time I will pay the principal amount of Rupees five hundred and redeem the land. There is a well in the said land. You are to take my share of water from the well and to raise garden crops in the said land. Should the amount remain unpaid after that date, I will continue the land with you until I pay the amount. I will not plead any objection, &c. You are to keep the embankments and boundary marks of the said land in repair according to law. Unless I pay the money I will not disturb (your) possession of the land. This bond I have duly given in writing. The date aforesaid. I, the debtor, have duly received the said amount of Rs. 500 (five hundred) of the *Surat* currency which you have this day paid to me, and have duly given this acknowledgment in writing. The date aforesaid. The handwriting of *Antaji Balkrishna Vategavkar*, inhabitant of *Yeravle*, the 27th March 1873. My own handwriting.

The defendant admitted the execution of the bond, but pleaded want of consideration and limitation.

The Subordinate Judge found that the payment of consideration was not proved, and rejected the claim.

On appeal the District Judge held that the consideration was paid; he, therefore, reversed the decree and allowed the plaintiff's claim.

The defendant preferred a second appeal.

Lang (Advocate-General) with *Vishnu Krishna Bhatavdekar* for the Appellant (defendant) :—The mortgage-bond stipulates that the plaintiff should take and retain possession of the property for five years and appropriate the income in lieu of interest. But as he failed to take possession, the Judge has passed a personal decree against the defendant. The plaintiff's cause of action against the defendant personally is clearly time-barred, the suit not being brought until 1888. Further, the lower Court was wrong in allowing interest. Under the terms of the deed, the plaintiff was to take possession, and appropriate income in lieu of interest. If he failed to take possession, he must suffer for his own negligence. Lastly, the Judge was wrong in passing [427] a decree for the sale of the property. The transaction in dispute is a usufructuary mortgage, which does not carry with it the right of sale—*Shaik Idrus v. Abdul Rahiman*, I. L. R., 16 Bom., 303.

[CANDY, J.:—How do you reconcile the rulings of the Full Bench in *Motiram v. Viithai*, I. L. R., 13 Bom., 90, with the one quoted?]

The mortgage in that case was a simple mortgage usufructuary. The intention with respect to the sale of the property must be gathered from the instrument itself. If it contains no claim of sale, then there can be no sale. Section 67 of the Transfer of Property Act (IV of 1882) is to the same effect. The words in the bond sued upon are "unless I pay the money I will not

disturb your possession." There is nothing in the bond to show that the right of sale was given to the mortgagee.

Phirozeshah M. Mehta (with *Ganesh Krishna Deshmukh*) for the Respondent (plaintiff):—The instrument in dispute is an ordinary mortgage-bond. The interest was not secured upon the produce of the land. The produce was to be taken merely in liquidation of interest. The ruling in *Shaik Idrus v. Abdul Rahiman*, I. L. R., 16 Bom., 303, is not applicable to the present case, because in that case there was no stipulation that the mortgagor should pay the amount; the amount was to be recovered from the mortgaged property. The bond in the present case contains a covenant that the defendant would pay the money after the expiration of five years—*Ramayya v. Guruva*, I. L. R., 14 Mad., 232. There being an undertaking in the mortgage-bond to pay, that gives the mortgagee a right to sue for sale. When there is a covenant in the usufructuary mortgage to pay, as in the present case, it ceases to be a pure usufructuary mortgage, and carries with it the right of sale if the money be not paid within the stipulated time—*Macpherson on Mortgage*, page 11. Owing to the plaintiff's failure to take possession of the land, the defendant has not only appropriated the produce thereof, but has, in addition, enjoyed the benefit of the loan of Rs. 500. We are, therefore, entitled to recover interest.

[428] **Candy, J.**:—Admittedly the decree against the defendant personally was bad and must be reversed.

It is further contended that under the bond the mortgagee had no right to ask that in default the land should be sold. But this is not so. It was not merely a usufructuary mortgage, which would confer no right to have the property sold. There was a distinct covenant to pay the principal, and the land was security for the same; so we cannot infer that the intention of the parties was that the property should not be sold. It was a "simple mortgage usufructuary," carrying the right to have the property sold in default of payment of the principal sum of Rs. 500.

Plaintiff's pleader also asks that the property may be sold in default of payment of interest. That claim is bad. For the plaintiff was entitled to possession in lieu of interest, and, if he never took the trouble to obtain possession, he lost his right to interest. The land was security for the principal. The decree must be amended, and judgment passed for Rs. 500, to be paid within three months; in default the land to be sold. Costs in proportion throughout.

Decree amended.

NOTES.

[This was followed in (1909) 34 Bom., 129; see also (1896) 22 Bom., 440; (1905) 9 O.C., 144; (1906) 10 O.C., 29; (1908) 11 O.C., 323.]

[17 Bom. 428]

APPELLATE CIVIL.

The 1st August, 1892.

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Bhagvan.....(Original Plaintiff) Appellant

versus

Kesur Kuverji.....(Original Defendant) Respondent.*

*Civil Procedure Code (Act XIV of 1882), Sec. 574—Judgment of
Appellate Court—Reasons for the decision to be stated.*

Section 574 of the Code of Civil Procedure (Act XIV of 1882) is imperative and under it the Appellate Court is bound to state the reasons for its decision.

A Court of appeal framed certain issues under section 566 of the Code of Civil Procedure (Act XIV of 1882), and remanded them for findings by the original Court. On the return of those findings, as neither party filed any objections, the [429] Appellate Court accepted these findings, without giving any reasons for so doing, or even stating in its judgment whether it concurred in them or not, and confirmed the decree of the original Court.

Held, that the judgment of the Appellate Court was not a judgment according to law.

SECOND APPEAL from the decision of T. Hamilton, Acting District Judge of Surat, in Appeal No. 22 of 1889 of the District File.

The plaintiffs sued to recover one-fifth share of a certain field, alleging that they had purchased this share of the field from one Kalyan Jogi, who had inherited it from Bhula Lalbhai.

The Subordinate Judge rejected the plaintiff's claim.

On appeal the District Judge raised the following issues:—

(1) Had Bhula Lalbhai one-fifth share in the field in question?

(2) Did Kalyan Jogi obtain this one-fifth share from Bhula by inheritance or gift?

The District Judge, being of opinion that the plaintiffs should have been allowed to examine certain witnesses they had already named in their *darkhast*, remanded the case, in order that, after examining those witnesses, the lower Court might record findings on the above issues.

The Subordinate Judge recorded his findings on both the issues in the negative.

On the return of these findings the hearing of the appeal was resumed.

No objections to the findings having been filed on either side, the District Judge confirmed the lower Court's decree, without, however, giving any reasons for his decision.

The plaintiffs thereupon preferred a second appeal to the High Court.

Govardhanram M. Tripathi for Appellants:—The District Judge's judgment is not a judgment according to law. He does not give any reasons for the decision. Under section 574 of the Code of Civil Procedure he is bound to state the reasons for his [430] decision—*Umed Ali v. Salima Bibi*, I. L. R., 6 All., 383; *Mumtaz Begam v. Fateh Husain*, I. L. R., 6 All., 391.

Majid M. Munshi for Respondent:—Neither party took any objections to the findings of the Court of First Instance. The Lower Appellate Court was, therefore, right in accepting those findings and confirming the decree.

* Second Appeal, No. 298 of 1891.

Jardine, J. :—The District Judge under section 566 of the Code of Civil Procedure framed issues of fact, and remanded them for findings by the original Court. On return of the findings, the District Judge overruled a contention of the present appellants that the Subordinate Judge had wrongly refused to take the evidence of certain witnesses. It does not appear, however, that any memorandum of objections was filed under section 567, or that any objection was taken orally at the hearing to the findings as not justified by the evidence on record. The District Judge silently accepted these findings, without giving any reasons for so doing, or even stating in his judgment whether he concurred in them or not.

The only point argued before us in support of the appeal is that section 574 of the Code of Civil Procedure is imperative, and required the District Judge to give his own decision, and the reasons for it, upon the issues remanded to the original Court under section 566. In support of this contention, *Umed Ali v. Salima Bibi*, I. L. R., 6 All., 383, and *Mumtaz Begam v. Fateh Husain*, I. L. R., 6 All., 391, are cited. The point does not appear to have been decided by this High Court. But we are of opinion that these cases interpret the Code correctly. Section 567 requires the lower Court of appeal to proceed to determine the appeal. Section 571 requires it to pronounce judgment, and section 574 is imperative as to what the judgment is to contain.

We, therefore, set aside the decree of the District Court and remand the appeal to that Court, in order that it may record judgment as required by the law, and pass a decree thereupon. Under the circumstances, we direct that the parties pay their own costs in this Court.

Decree reversed and case remanded.

NOTES.

[Similar decisions were given in (1897) 7 M. L. J., 236; (1897) 20 Mad., 466; (1900) 31 Mad., 469; (1908) 17 M. L. J., 62 n; (1898) 23 Bom., 334; (1895) 19 Bom., 551; (1905) 8 O. C., 290.]

[431] PRIVY COUNCIL.

*The 18th, 19th, 24th and 25th June, and 1st July, 1891 and
the 19th November, 1892.*

PRESENT :

LORDS HOBHOUSE, MACNAGHTEN, HANNEN, AND SHAND, AND
SIR RICHARD COUCH.

Shekh Sultan Sani.....Appellant
and

Shekh Ajmodin.....Respondent;
and by Revivor

Shekh Sultan Sani.....Appellant
and

Begumbi kom Ajmodin and others.....Respondents.

[On appeal from a judgment of the Governor in Council of Bombay as an appellate Court under Regulation XXIX of 1827.]

Resumption by the Government of estates held on political tenure—Mixed estate of shranjam and inam so held—Non-jurisdiction of Civil Courts.

The engagements entered into by treaty between the British Government and the Raja of Satara in 1819, and the terms fixed separately with the several Satara jaghirdars in 1820,

did not impart any greater fixity of tenure than had previously belonged to the latter under Maratha rule; and their jaghirs remained liable to resumption at the will of the Government.

The question to whom a saranjam, or jaghir, shall be granted, upon the death of its holder, is one which belongs exclusively to the Government to be determined upon political considerations; and it is not within the competency of any legal tribunal to review the decision.

Inam villages and lands, with the mokasa, included originally in one saranjam granted under the Maratha rule for the support of troops, remained after 1820, when the rule of the Peshwa had ceased, a personal and military jaghir, forming a mixed estate of saranjam and inam. The tenure remained, under British rule, political; and no distinction could be drawn in this respect between the inam lands and the saranjam. The whole estate passed to the person whom the Government at its discretion, for political reasons, recognized as the grantee, without its being competent to any Court of law to question the decision of the executive authority in the matter.

- **APPEAL** from a judgment (28th April 1887) of the Governor of Bombay in Council, as an appellate Court under Regulation XXIX of 1827, varying a judgment (8th June 1886) of the Court of the Agent for Sardars in the Deccan and Khandesh.

The plaintiff (now appellant) alleges himself to be the son of Shekh Khan Mahomed Waikar, deceased on 31st December 1872, who was a jaghirdar, and sardar of the second class on the list of the Agent for Sardars. The defendant Shekh Ajmodin valad Abdul Rajak was the son of the daughter of the [432] brother, named Abdul Kadar, of the abovenamed sardar. Abdul Kadar died in 1873, after taking this grandson as his "adopted son." The administrators of the estate, Rao Bahadur Gopal Hari Deshmukh and Ganesh Dinkar Joshi, represented Ajmodin in the earlier proceedings, and on his death this appeal was revived against the other respondents above named.

The principal question was whether the saranjam and inams claimed as part of the inheritance and property which had belonged to the deceased Shekh Khan Mahomed were or were not political tenures to which the succession could be dealt with by the Government only, at its discretion, apart from any jurisdiction of the Civil Courts.

In the last century, when the family to which Shekh Khan Mahomed Waikar belonged was represented by Shekh Mira, then in the service of the Raja of Satara, grants of inam, mokasa and saranjam were made to Shekh Mira, comprising villages in Satara, Poona, and Khandesh; and with some of these the estates now claimed were identical. The grants were continued by the Maratha ruler to Shekh Mira's adopted son, who was succeeded by his son Shekh Mira II in 1785. After the hostilities of 1819 had ended, the treaty of 25th September 1819 guaranteed the possession of the latter, and he, besides, was one of the jaghirdars with whom an engagement was separately made by the Government in 1820. He died in 1828, leaving two sons, of whom the abovenamed Shekh Khan Mahomed, who died in 1872, was the elder, and Shekh Abdul Kadar above named, who died in 1873, was the younger. In December 1836, Sultan Sani, this appellant, was born, and from his birth down to Shekh Khan Mahomed's death, in 1872 he was acknowledged by Khan Mahomed to be his legitimate son. However, it was equally a fact that in 1857 an official inquiry was held as to Sultan Sani's birth, and it was decided that he was not the son of the Shekh, or of his wife, but was a child substituted by arrangement when born, as he was, of one of the female servants of the house. This decision was accepted as correct by the Governor in Council and Her Majesty's Government; and it was, in consequence, determined that Khan Mahomed's saranjam

[433] should be resumed at his death." Shekh Khan Mahomed having died, the Government on the 23rd October 1873, ordered the Agent for Sardars to investigate judicially, and after notice, whether Shekh Ajmodin was the legitimate successor to the headship of the Waikar family, either by adoption or descent. The Agent reported that no custom of adoption among Mahomedans in the Deccan was proved, but that Abdul Kadar did, before his death in 1873, execute a document with intent that Shekh Ajmodin should be his heir: the Agent referred also to Shekh Mira's having "adopted" a son in 1740. The Government on the 27th March 1874, declared that there were sufficient reasons for recognizing Shekh Ajmodin as the head of the family, to whom the saranjam should be continued. This was confirmed by the Secretary of State for India on the 18th June 1874. The inam portion of the family estate remained after Khan Mahomed's death in the hands of the Collector of Satara, who managed it; and as to it, the opinion of the "Alienation Settlement Officer" was called for. This he gave on the 6th October 1876, to the effect that "the whole estate intact, having been restored under the treaty of the 3rd July 1820, was continuable as a guaranteed estate to Shekh Ajmodin as the head of the family." The Government on the 6th November 1876, resolved that this should be carried out. The saranjam and inam estates were then made over to the defendant, to whom the administrators above named made over the private property of the late Mahomed Khan. This was reported to the Government by the Collector of Satara on the 7th February 1877.

On the 8th September 1884, a certificate under the 6th section of the Pensions' Act, XXIII of 1871, was granted by the Government, enabling the plaintiff to take the present proceedings, which he attempted to commence as a pauper on the 1st November 1884; but on the 5th June 1885, he paid the Court fees, and the suit came on for hearing before the Agent for Sardars. The suit, valued at Rs. 3,75,870, was for the possession of (1) four parcels of inam land and two parcels of mirasi land in the taluka of Wai in the Satara district: (2) the income of mokasa amals and saranjam in villages in different districts of the Deccan and Khandesh: (3) of inam and mirasi lands in the district of Khan-[434]desh, the rents of which had been withheld, by order of the authorities, from the plaintiff: (4) of devasthan lands. The property was described at length in four schedules corresponding to the above. A declaration of right, an injunction and mesne profits were claimed by the plaintiff, as son and heir, and also as devisee under a will of Khan Mahomed executed on 29th September 1860.

The fact of the will was undisputed; but the defence, in brief, was that the plaintiff was not the son of Shekh Khan Mahomed. It was also insisted that the Government Resolution of 27th March 1874, confirmed on 18th June 1874, as to the saranjam, and another Resolution of 6th November 1876, as to the inam lands, had given the defendant a title of which he could not be deprived by the order of any Civil Court. The issues raised questions indicated by this defence.

The Agent for Sardars found on the evidence that the claimant was the only son of Khan Mahomed, and as such was entitled to share in all his property in respect of which the Court was competent to pass any decree. This he considered it competent to do as to all the property except the saranjams. These he held to be completely at the disposition of the Government. As to the rest of the property, including the inams, he decreed to the plaintiff that share of it to which the Mahomedan law would have entitled him as only son.

Meane profits were not allowed, 'on the ground that, the defendant's possession having been given to him by the Government, he was not in wrongful possession. Both parties appealed, under Regulation XXIX of 1827, to the Governor in Council constituted by that law an appellate Court from that of the Agent. The Governor in Council was not satisfied that the plaintiff was the legitimate son of Khan Mahomed, and the decision of the Agent was reversed upon this point. The following is the judgment so far as it is material to this report. After a statement of the facts, the Governor in Council continued thus :—

" It follows that Sultan Sani is not entitled to succeed to any property as heir. But Khan Mahomed executed a will in Sultan [435] Sani's favour : and as he must be regarded as a stranger, this will, though made without the consent of heirs, is valid to the extent of one-third of any property of which Khan Mahomed, and not the Government, had the disposal.

" The great mass of the property which forms the subject of the suit was held by Khan Mahomed's ancestors under grants of old date, which merged into a re-grant under the agreement concluded with Shekh Mira Waikar, dated 3rd July 1820, which will be found at page 377 of the IV Vol. of Aitchison's Treaties (Ed. 1876). By this agreement the 'jaghirs, &c.,' were restored to Shekh Mira, and the 'Inam villages, watans, and other allowances' were continued to him. Upon Khan Mahomed's death, the Government, in accordance with the decision already referred to, resumed the jaghir or saranjam, and after a while regranted it to the defendant, Ajmodin. There is no doubt whatever that the Government had a perfect right to do this, and that its action cannot be questioned. It is settled law that the Government may resume jaghirs or saranjams whenever it please, and that the Civil Court cannot question such action. Even, therefore, if the resumption of a saranjam were wholly unjustifiable, it would be none the less valid : but certainly no resumption could be more justifiable than one made as a punishment to the saranjamdar for palming off upon Government a spurious son as his heir. This has hardly been disputed ; and the argument at the Bar has been mainly directed to the question whether the resumption and regrant to Ajmodin of the inam, as distinguished from the saranjam, can be upheld as an act legally within the competency of Government. Now, it certainly appears from the old sanads that the inams were originally held on a somewhat different tenure from the saranjam. They seem to have been granted for maintenance and as a reward for past service, rather than on condition of future service. The same distinction may perhaps have been intended, though it is not very clear, in the agreement of the 3rd July 1820. It is also evident that, after it had been determined to resume the saranjam, Government did not for some time contemplate a resumption of the inam, but rather intended that all claims to the inam should be adjudicated on in the usual course by the [436] Civil Court. But in 1876 Government finally determined to resume the inam, and regrant it to Ajmodin : and the question is, not whether this determination was consistent with the advice of all its officers, or with its own previous views and opinions, but whether its action was within the powers vested in it by law. Now, looking to the provisions of Schedule B, Rule 10 of Act XI of 1852, to section 1, clause 2, and section 16 of Bombay Act II of 1863, and to section 2, clause 2, and section 32 of Bombay Act VII of 1863, it must, in the opinion of the Governor in Council, be held that Government has the power to resume, on political considerations, any property which is held on political tenure : and that it is for Government to determine, in every instance, whether the tenure is political. This being so, the question is whether Government did, in 1876, resume the inams of the Waikar family on the ground that they were held on political tenure. Now, the decision of Government is

contained in its Resolution No. 6836 of the 6th November 1876, which in its preamble sets forth a memorandum of the Alienation Settlement Officer, containing his opinion that 'as Government have sanctioned the adoption' (i.e. of Ajmodin) 'the whole estate, intact, saranjam and inam, as restored after the war under the treaty of 3rd July 1820, is continuable as a guaranteed estate to the adopted son as the head of the family, and should be entered in the accounts accordingly, the same as all other treaty estates of mixed saranjam and inam'; and then the Resolution is passed in the following terms:—'The suggestions of the Alienation Settlement Officer are approved, and should be carried out.' So that Government adopted the view of the Alienation Settlement Officer, and that view clearly was that, under the terms of the treaty of 1820, and other similar treaties, a mixed estate of saranjam and inam is all held on the same political tenure, and ought to pass intact to the person whom Government may recognise as the head of the family. This view may have been right or wrong, (and looking to the terms of the treaty of 3rd July 1820, the Governor in Council would find it difficult to say that it was wrong); but, at any rate, as it was adopted by Government as the ground of its action, it does not appear open to any Court to dispute it.

[437] "Another ground on which the resumption and regrant of the inam may well be justified is that the agreement of 3rd July 1820, under which the inam was held, cannot be construed as amounting to more than a grant to Shekh Mira for his own life. It is true that in 1842 the saranjam was by order of the Court of Directors made hereditary, but nothing was said about the inam. It seems to follow that, if the inam was included in the order, then it was treated as saranjam and was included in the same incidents: while, if it was not included, then it has never been made hereditary, and Government had a perfect right to resume it. In either case Ajmodin's title is unassailable. It follows that all claims made in this and the companion suits to a share in the saranjam and inam estates granted under the agreement of the 3rd July 1820, must be disallowed."

The Governor in Council then considered the claim to the private property of Khan Mahomed, holding that, as to a portion of it, limitation barred the present suit. The following relates to what was awarded, the property being considered in two classes, viz. (1) that which was in possession of Khan Mahomed, or held in trust for him, at the date of his death, and (2) that to which he was entitled by inheritance on the death of Abdul Kadar. The judgment continued thus:—"There are three schedules marked A, B and C annexed to the plaint. The property contained in Schedule A is in the possession of the defendant, and the plaintiff sues to recover possession. Up to 1876 this property (other than the saranjam) was held under attachment by Government for the benefit of Khan Mahomed's and Abdul Kadar's creditors, and eventually of their heirs. There was no adverse possession until the property was handed over to the defendant in 1876, and the suit is well within twelve years from that date. But the claim to the property mentioned in Schedules B and C, appears to be of a different nature, and to come under a different rule of limitation. The property mentioned in Schedule B is stated in the plaint to be not in the possession of the defendant, but of third parties, and what is asked for is an injunction to the defendant not to obstruct the plaintiff in recovering the property from such third parties. The property in Schedule [438] C is declared in the plaint to be in the possession of the plaintiff himself; and what is asked for is a declaration that the defendant has no title to such property. The suit then, as regards the properties set forth in Schedules B and C, is one simply for an injunction and declaration; and the Governor in Council can find no sufficient authority for holding that a longer period of

limitation than six years is allowed for such a suit. It appears to be a claim for which no other period is provided in Schedule II of the Limitation Act (XV of 1877), and therefore to fall within article 120.* In this view, the suit in regard to the properties included in Schedules B and C is barred, as against the present defendant, whatever may be the case as regards third parties, who may be in possession of any portion of the property: for it is admitted that the cause of action, so far as the injunction and declaration are asked for, arose in 1876.

"Confining his attention, therefore, to Schedule A, the Governor in Council finds that Sultan Sani is entitled under the will to one-third of any private property belonging to Khan Mahomed, while Rahimunissa, as heir, takes the remaining two-thirds."

An order as to each portion of the property separately claimed concluded the judgment.

On this appeal, preferred as provided for in the Regulation XXIX of 1827.

Mr. R. V. Doyme, for the Appellant, argued that the Agent for Sardars, in the first instance, was wrong in dismissing the claim to the saranjam, while his decision had been right as to the inams, and as to the rest of the property which he decreed to the plaintiff. The judgment of the Governor in Council erred both as to the saranjam and the inams, which should have been held to be hereditary in the family of the late Shekh Mahomed Khan, and not liable to resumption on his death. The saranjam, although originally an estate resumable on the death of the holder by the ruling power which granted it, had subsequently been rendered an estate hereditary in the family. The effect of the guarantee of the British Government in the treaty of 1819 and of the agreement, "fixing terms," with the Waikar [439] jaghirdar in 1820, had been to confirm the title. The saranjam had not remained subject to its original conditions. It had passed from father to son for three generations. He referred to the Satara Treaty, No. II, of 26th September 1819, in Vol. VI of Aitchison's "Treaties, Engagements and Sanads", (edition of 1864), guaranteeing in article 7 the possession of the jaghirdars; also to the terms fixed for Shekh Mira Waikar, as one of the Satara jaghirdars, who was ancestor of Khan Mahomed, in the agreement of 3rd July 1820, Vol. VI, (Ed. 1864), p. 78. If the words of the treaty had been conclusive that the saranjam was not hereditary, there would have been no ground for the present contention; but they were not, and they were consistent with what had afterwards taken place by way of rendering the estate continuous and hereditary in the family of the jaghirdar. Reference was made to passages in the last chapter of Grant Duff's History of the Mahrattas; and to correspondence in the years 1834—1842, inclusive, between the Bombay Government and the Court of Directors, as to the hereditary character of this tenure. According to this, it appeared to have been ordered, as between the Court and the Government, that the saranjam should be considered hereditary by the latter. However, nevertheless, on the 5th April 1860, the Government Resolution was that even if Khan Mahomed should leave a legitimate son, the saranjam would not be continued to the latter. It was submitted that even if this had not been founded on mere error in the

* [Art. 120:—

Description of suit.	Period of limitation.	Time from which period begins to run
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.]

conclusion that Shekh Sultan Sani was not the son of Khan Mahomed, this Resolution, and all the subsequent proceedings in derogation of that son's right of succession, were beyond the scope of the executive power. The appellant's case was that in 1873 the Government had not retained, and did not possess, authority to alter the right of succession to either the saranjam, or the inam estates, which had then become fixed to descend to the elder son, in consequence of the repeated acts of recognition of the succession in the family of Khan Mahomed. But the appellant's case was stronger, as regarded the inams, which had been resumed, than as to the saranjam; the former was a reward for past services, the latter involved, originally, the support of troops for service. The agreement of 1820 referred expressly [440] to inams, viz. to inam villages, watahs, and other allowances; and the inams were not, and could not lawfully have been, comprised in the Resolution of 5th April 1860, as they had then become fixed to descend to the *sardar's heir*, and were subject to his testamentary power, within the rules of law. Nor had the Government the power to effect what the Resolution of 27th March 1874, had been treated as effecting, the recognition of the respondent Ajmodin as the person to whom the saranjam and the inams should be continued; and in taking possession of the latter, as the Collector had done, he had acted without due warrant, these estates being subject to the law of inheritance, and the rights of the appellant subsisting. Reference was made to *Ramchandra Mantri v. Venkatrao Mantri*, I. L. R., 6 Bom., 598; *Gulabdas Jaggivandas v. The Collector of Surat*, L. R., 6 I. A., 54; I. L. R., 3 Bom., 186; *Premshankar Raahamathji v. The Government of Bombay*, 8 Bom. H. C. Rep. (A. C. J.), 195; *Dosibai v. Ishvardas Jaggivandas*, L. R., 18 I. A., 22; I. L. R., 15 Bom., 222; The Inam Act, XI of 1852; Bombay Acts II and VII of 1863; The Penions Act, XXIII of 1871, section 4. Upon the question of the appellant's birth the evidence supported the finding of the first Court that the appellant was the son of Khan Mahomed. The inquiry in 1857 was one in the Revenue Department; and the effect of a judgment could not be attributed to it. Reference was made to sections 40—44 of the Indian Evidence Act, 1872, relating to prior judgments, when relevant, and to *Naranji Bhikhabhai v. Dipa Umed*, I. L. R., 3 Bom., 3, and *Gujju Lall v. Fatteh Lall*, I. L. R., 6 Cal., 171. Effect was to be given to the presumption of Mahomedan law as to legitimacy of birth, on which point *Ashruf ud Dowla Ahmed Hossein v. Hyder Hossein Khan*, 11 Moore I. A., 94, *Mahammad Azmat Ali Khan v. Lall Begum*, L. R., 9 I. A., 8, I. L. R., 8 Cal., 422, were referred to. The judgment of the first Court should be restored, and the appellant should obtain the declaration of legitimacy claimed, and of his title to the saranjam and inams.

Mr. R. B. Finlay, Q. C., and Mr. J. D. Mayne, for the Respondent:—The principal points in their argument were the following. The appellant's title, both to the saranjam and to the inams, was derived, according to his claim, from grants to his alleged ancestors by the former ruling power, and the recognition by the present one. His title, in short, depended on the effect of the treaty of 1819, and the engagement of 1820, amounting to a grant to him; and this was his title as to both kinds of estate, the saranjam and the inams. Neither the treaty, nor the agreement, on the point as to what quantity of estate they conferred, were subject to the interpretation of the Civil Courts. They were to be construed by the Government, which had not recognized that they conferred anything more than a life tenure in either the saranjams or the inams. Both these estates were of a political character, and the succession to them was at the discretion of the Government to be allowed or not. Although the grantee's son had succeeded at his death, as in the case of Khan Mahomed in 1827, that

was not by any legal right of inheritance, but because the Government, on account of his birth, and for political reasons, allowed him to succeed. The Government, after the war, parcelled out the tenures on the understanding that existing rights, with regard to Maratha custom, should be observed, and the raj was disposed of on the same terms. To the Raja of Satara the raj was granted, conditionally on his respecting the titles of the jaghirdars, to whom their titles were guaranteed, but only to the extent of their then prevailing rights. The result was that the saranjams and the inams were afterwards held, as they had been before 1820, by holders, who held them as tenures personal and military, as these tenures had been in their origin. The tenures were for life only. Saranjams by custom were at the disposal of the ruling power, and the particular estate in this case was held on a political tenure, a term used in reference to such estates and appearing in the acts of the legislature, as in 1863. The inams now claimed were, in effect, granted by the Government, on the same principle, and were held for life only. Although the correspondence of 1834—1842 took place, no alteration was made in the tenure of Khan Mahomed, of his saranjam and inam estates. As to the evidence about the claimant's birth, the Appellate Court was [442] right in its conclusion that he had not made out his title as son and heir to Khan Mahomed, and was right in permitting his claim to rest only on the will of his alleged father as to the property that could be so disposed of. The right of the Government to deal with the other estates, the inam as well as saranjam, which in this case had been mixed together in the Maratha grants, was recognized by legislation; and the term "political tenure" used by it, was applicable here.

Reference was made to Act XI of 1852, sections 10 and 11 of Schedule B, Bombay Acts II and VII of 1867 and to *Gubindas Jaggvandas v. The Collector of Surat*, L. R., 6 I. A., 54; I. L. R., 3 Bom. 186; *Dosibai v. Ishwardas Jaggvandas*, L. R., 18 I. A., 12; I. L. R., 15 Bom., 222; *Madhavray Manohar v. Atmaram Kesha*, I. L. R., 15 Bom., 519.

Mr. R. V. Doyne replied:—The defendant-respondent having died before the delivery of judgment, an order was made that the appeal should be revived against the respondents above named.

Their Lordships' judgment was given on the 19th November 1892, by

Lord Hannen:—The plaintiff, Sultan Sani, claims to be the son of Shekh Khan Mahomed, who died on the 31st December 1872, and as such son to be entitled to certain properties alleged to have been held by Khan Mahomed by a tenure known as saranjam, and certain other properties alleged to have been held by a tenure known as inam. The nature of these tenures will be considered presently. The plaintiff also claimed the property as devised to him under the will of Khan Mahomed.

The suit was one in the Court of the Agent for Sardars, a tribunal created in 1827 (Bombay Regulation XXIX of 1827) for the trial of suits against certain Deccan sardars, an appeal being given to the Governor in Council of Bombay, and from him to the Queen in Council.

In this suit the plaintiff sought to recover possession from the defendant Ajmodin (the predecessor of the present respondents) of the saranjam and inam lands of which (as the plaintiff [443] alleged) the defendant had been put into wrongful possession by the Bombay Government after the death of Khan Mahomed.

In answer to this suit it was contended by the defendant that the plaintiff was not the son of Khan Mahomed; and, secondly, that the tenure of the lands

claimed was such that the Government was entitled, on the death of Khan Mahomed, to resume them and assign them to whom it pleased.

The title of the plaintiff under the will of Khan Mahomed was not disputed as to the property of the testator over which the Government had not such a disposing power.

The Agent for Sardars held (8th June 1886) that the plaintiff is the son of Khan Mahomed, but that the saranjams were completely at the disposal of the Government. As to the other lands, which he distinguished as inam, he held that the plaintiff was entitled under the Mahomedan law to recover as only son of the testator.

On appeal to the Governor in Council, His Excellency in Council held that the plaintiff was not the son of Khan Mahomed, and that the Government had power not only to resume the saranjam, but also the so-called inam property, and to assign them to whom it pleased.

From this decision the present appeal is brought to Her Majesty in Council.

The Agent for Sardars and the Governor in Council have both held that the saranjam lands were of such a tenure that the Government was entitled to resume them and to re-grant them to whom it pleased. Their Lordships propose to consider this question in the first instance.

"Saranjam" is stated in Wilson's Glossary to be an "assignment of lands or their revenue by the State for the support of troops."

"Mokasa," a word which will be found in several of the documents hereinafter referred to, appears to have a meaning nearly equivalent to that of saranjam. It is defined as "villages [444] or lands, or a share in the rule over them, and revenue arising from them, granted on condition of military service or in inam."

"Inami" is stated by Wilson to mean "grants of land held rent-free, and in hereditary and perpetual occupation."

The history of the property to which this suit relates is as follows :--

In 1708, one Shekh Meeran (or Mira) was in the service of the Raja of Satara. For assistance rendered to the Raja "he received the inam village of Pasarni, a pension of Rs. 1,800 monthly, and was raised to the rank of a commander of 60 horses, for the maintenance of which he held mokasa, amals (meaning 'share of revenue') to the amount of Rs. 40,000. The pension ceased with the first Shekh Meeran, and the mokasa has since fallen off to about Rs. 18,000, which, with Pasarni, is still enjoyed for the performance of service to the Raja of Satara with 10 horsemen." This is given on the authority of Lieutenant-Colonel Biggs, formerly resident at Satara. The date does not appear. The property thus granted was situated in the districts of Satara, Poona and Khandesh.

The earliest document relating to the property is of the date of 1709, A.D. This document is headed, "Body of horse under the control of the State" and it runs thus :-- "Body (of horse under) Shekh Mira; saranjam, total as in last year (as per) mandatory letters;" and it includes nine mokasa villages and the inam village of Pasarni.

The next document is dated 1715, A.D., and is also headed "Body of horse under the control of the State, Body (of horse) Shekh Mira," and is as follows :-- "The letter of command, dated 18th moon Savat (regarding) the village of Pasarni, Samat Haveli, Prant War. A deed of inam was formerly given about the grant of this village as inam to the aforementioned person, together with all rights and cesses, the present and future taxes, and together with sardeshmukhi. The deed having been burnt, new deeds have been prepared and given."

In 1718, A.D., a document headed, "Saranjam for the body of horse under the control of the state . . . in the charge [445] of Shekh Mira," includes and comprises "village of Pasarni, inam village," also "inam lands in Kasba Wai (called) Katban, the place of residence of the aforementioned person, are granted in inam."

Katban appears to have been granted to Shekh Mira, (date uncertain, qu. 1715), "to him and his son, grandson, &c., from generation to generation."

The grant of Pasarni was confirmed in 1752 by the mother of the then Raja of Satara to Shekh Khan Mahomed I, the son of Shekh Mira, in the same terms.

In a document described as the Peshwa's diary of 1763, A.D., it is recorded that "Mokasa villages, &c., have been continued by the Government from former times to Shekh Khan Mahomed in the service of Government. They are in the same manner confirmed."

Amongst the properties enumerated are "the whole village of Pasarni, Samat Haveli, Prant Wai, together with the deshmukhi and sardeshmukhi (rights) being inam."

In 1785, A.D., in the diary of the Peshwa is registered "the sanad for continuing the saranjam to Shekh Mira Waikar," i.e., Mira II, and the saranjam is thus described,—"A saranjam (consisting) of amal (shares of revenue) of mahals and of single villages, as also inam villages and lands, were continued from former times to Shekh Khan Mahomed Walad Shekh Mira for the support of troops. He having died, the saranjam and inam villages and lands have as before been confirmed upon his son Shekh Mira for the support of troops." Then follows an enumeration of the properties, which includes the mokasa lands and inam villages and lands, amongst these latter being the whole village of Pasarni, Samat Haveli, Prant Wai.

It is to be observed that this document clearly includes the inam villages and lands with the mokasa as parts of one saranjam for the support of troops.

When the power of the Peshwa was overthrown, Shekh Mira II was in possession of this saranjam. A portion of the conquered territory was placed under the Government of the [446] Raja of Satara, Aitchison, Vol. VI, edition of 1864, No. 2, Articles I & 7, with whom a treaty was entered into on the 25th September 1819, by which it was provided that the possessions of the jaghirdars within the Raja's territory were to be under the guarantee of the British Government, which engaged to secure the performance of the service due to the Raja according to established custom.

Separate agreements were entered into with several jaghirdars of whom Shekh Mira II was one. The agreement with Shekh Mira II, which was made on the 3rd July 1820, thus commences, Aitchison, Vol. VI, edition of 1864, p. 78:—"These jaghirs, &c., were formerly held by you as a personal and military jaghir; but having come into the possession of the British Government along with the rest of the country, they are now restored, in consideration of the antiquity and respectability of the family, to be held as formerly in personal and military jaghirs."

The 7th Article stipulates that "without orders from Government no extra troops are to be levied, and none assembled for the purpose of making war on any one. In matters of family disputes concerning relationship and such like, no appeal to arms can be permitted, but the case is to be represented to the Agent of the British Government, who will communicate with the Government of His Highness, and whatever decision is given must be reckoned binding."

This agreement does not specify the jaghirs to which it relates. The 5th Article is as follows:—

"Whatever inam villages, watans, and other allowances have hitherto belonged to Shekh Mira Waikar within the territories of the British Govern-

ment or of His Highness shall be continued, and whatever items of revenue belonging to His Highness's Government may be within the jaghir shall be continued to be paid."

There are no words in this agreement having reference to the descendants of Shekh Mira, and it distinctly states that the jaghirs are to be held "as formerly in personal and military jaghirs." This agreement must be regarded as the root of the title (whatever it may be) which was required by Shekh Mira II.

[447] With regard to the expression contained in some of the sanads previously cited of the grant being to the person named, "his son, grandson, &c., from generation to generation," it has been observed by many writers of authority on this subject that they do not, as might be supposed, impart a fixed hereditary tenure. Colonel Etheridge, in his preface to the narrative of the Bombay Inam Commission, quotes the language of Sir THOMAS MUNRO in a minute of the 15th March 1822, in which he states that the "terms in such documents (sanads) 'for ever,' 'from generation to generation,' or in Hindu grants, 'while the sun and moon endure,' are mere forms of expression, and were never supposed either by the donor or receiver to convey the durability which they imply, or any beyond the will of the sovereign;" and in a subsequent minute of the 16th January 1823, Sir THOMAS MUNRO shows that while the seizure of private property by the native princes would have been considered unjust by the country, jaghir grants were not regarded by the people in the light of private property. (Etheridge, p. 14.)

Their Lordships entertain no doubt that the engagements entered into by the English Government with the Raja of Satara and with the several jaghirdars did not impart any greater fixity of tenure than had been previously enjoyed by those jaghirdars under the native rulers, and that their jaghirs were liable to resumption at the will of the Government, although from reasons of political expediency the English authorities would not be disposed to add to the disturbance and confusion attending a conquest, by dispossessing the holders of property to any greater extent than was necessary for safety.

Thus, on the death of Shekh Mira II, in 1827, the saranjam, which he had enjoyed, was continued to his son Shekh Khan Mahomed II, but the character of his tenure was distinctly stated in the document by which possession was given to him: "Your father Shekh Mira Waikar died this year, and the saranjam in his possession was thereupon placed under attachment by Government. A petition having now been submitted by you, it has been decided to continue the saranjam to you as before for service to be rendered by you. The attachment has [448] therefore been removed, and . . . this sanad has been issued to you. The amount which is always paid from the Government Treasury on account of the mokasa, which forms part of the saranjam, shall therefore continue to be paid to you. As regards the alienated lands, you should take them back in your possession and enjoy them in accordance with past usage, and in accordance with the agreement passed by you to Government you must continue to honestly and faithfully perform the service." This last clause apparently relates to lands which had been alienated by Shekh Mira II, but which, as the Government pointed out, he had no right to do.

These were the terms on which Shokh Khan Mahomed II acquired the position of jaghirdar under the Raja of Satara. He accepted that position as the gift of the British Government, which had decided to continue the saranjam to him. In this document there is no reference to the descendants of Khan Mahomed, and the grant is made for service to be rendered by him, and is in its terms personal.

One of the questions to be determined in this case is whether, on the death of Khan Mahomed, the Government had or had not the same power of deciding to whom it would grant this saranjam, which it had exercised on the death of the previous holder in favour of Khan Mahomed. In making that grant the Government was no doubt influenced by the fact that Khan Mahomed was the son of the previous jaghirdar, and that it was politically expedient to continue the possession of the saranjam in the same family, but there is nothing to show that the Government recognized any right of succession in the son; the language of the grants in the cases both of Shekh Mira II and Shekh Khan Mahomed II points in the opposite direction. The practice of regranting jaghirs to the sons of preceding jaghirdars naturally had the effect of leading sons to expect to succeed their fathers, and when this practice was long continued in one family the original character of the holding became obscured. This process has been commented on by many writers on the subject of India. In the Honourable Mountstuart Elphinstone's History of India, it is said (5th edition, p. 82): "Notwithstanding all [449] these precautions, the usual consequences of such grants (jaghir) did not fail to appear." The lands had from the first had a tendency to become hereditary, and the control of the Government always grew weaker in proportion to the time that had elapsed from the first assignment. The original principle of the grant, however, was never lost sight of, and the necessity of observing its conditions was never denied." In the present instance there was but the one re-grant to Khan Mahomed since the original grant to Shekh Mira, and in that re-grant the character of the holding as saranjam (or jaghir) derived from the decision of the Government in the applicant's favour was expressly stated.

In 1834 an inquiry arose as to the tenure of certain jaghirs in Khandesh, and as to that of Shekh Mira. Mr. Warden, the deputy Agent, writing to Mr. Saville Marriott on the 3rd January 1834, says (Rec., p. 212), - "Shaik Mira Waikar was a Satara feudatory chief, serving the Raja with a few horse, and holding a saranjam for his life in Khandesh. I have referred to his sanad or title-deed, and find that his estate was clearly a life grant, the customary provision for the continuance of it by inheritance to be found in the sanads of all hereditary saranjamdars being omitted, and the usual form of life grants adopted."

What document Mr. Warden refers to does not appear; possibly it was the sanad of 1785.

In the course of the inquiry arising out of Mr. Warden's report, Mr. Elphinstone, who had been engaged in the settlement of the Deccan in 1818-19, was referred to by the Court of Directors for his advice, and he, in the year 1838, recommended that all jaghirs "granted by the Mogul Emperor or the Rajas of Satara should be hereditary in the fullest sense of the word;" and with regard to Shekh Mira he stated that his impression was "that Shekh Mira's ancestor commanded a Mogul fort at the time of the first conquest by the Marathas, and surrendered on terms, one of which was the receipt of a hereditary jaghir. If this be so we can have no right to resume his lands unless we can annul the agreements of former Governments;" and he [450] added that a reference to his Secretary's list of jaghirdars, prepared in 1818-19, would settle the question.

Upon reference to this list (transmitted 25th October 1819), which is headed, "Mr. Elphinstone's list of saranjams," Shekh Mira's name appears. He is there stated to belong to the class of Sardars or great chiefs. It is stated that he made his submission on the 28th March, having left the Peshwa at least a month before; that he is an old jaghirdar of the Shahu

Raja, and under the heading "Decision" is written: "To have all his jaghirs except those in the Nizam's country on account of his early submission and ancient family." And under the heading "For what period recommended" is written "Hereditary."

It has been seen, however, that this recommendation was not acted upon at the time, and that the grant, which was in fact made to Shekh Mira, did not contain any language importing that the grant was of an hereditary jaghir.

In consequence of the advice of Mr. Elphinstone the Court of Directors, in a Despatch of the 26th October 1842, directed that all jaghirs in "Class I of Mr. Mill's list, which bears date anterior to 1751, be, as Mr. Elphinstone recommends, hereditary in the fullest sense of the word, together with those of which the dates are unknown, but which are known to be ancient. The latter class, though small, includes the three resumed jaghirs of Shekh Mira, Sunshor Bahadur, and Behwant Rao Dabhary. The first of these, already restored to the son of the last holder, but for life only, must be considered hereditary."

It is to be observed with regard to this direction that it recognizes that the jaghirs of Shekh Mira have been restored to the son of the last holder (that is, to Shekh Khan Mahomed II, son of Shekh Mira II), but for life only, and that the time for taking any action with reference to the succession would not arise in the ordinary course of things until the death of Khan Mahomed. No fresh grant was made to Khan Mahomed, and his rights must depend upon that grant, which had in fact been made to him on the death of his father. It remained for the Government, when the necessity should arise, to determine to [461] whom it should re-grant, or in whom it should recognize, a right of succession to the jaghirs then possessed by Khan Mahomed.

This was the state of things down to 1857, when one Shaikh Sultan Inamdar presented a petition to the Assistant Inam Commissioner at Satara complaining that, although he and others shared in the inams held by the family of Khan Mahomed, their names were purposely omitted by him (Khan Mahomed) in a genealogical table, which he produced before the Mamlatdar of Wai in a certain inquiry affecting those shares, while a son of one Manik Dewtia was mentioned in it as his (Khan Mahomed's) son.

This petition was forwarded to the Magistrate of Satara, who directed an inquiry into the charge thus made against Khan Mahomed of putting forward the child of another man as his own.

This inquiry was conducted by the First Assistant Magistrate, Lieutenant Sandford (afterwards Sir HERBERT SANDFORD), whom the Governor in Council describes as a Magistrate of great experience and intimate knowledge of the people and politics of Satara. With him was associated, in the inquiry, Gopalrao Hurry, of whom the Governor says that he was an officer held in high estimation, who was afterwards raised to several important judicial posts.

This inquiry appears to have been a preliminary investigation with a view to considering the expediency of instituting criminal proceedings against Khan Mahomed and those supposed to have assisted him in putting forward a supposititious child as his own.

The inquiry was conducted in a judicial manner, the witnesses were examined on oath, and Khan Mahomed was offered the opportunity of cross-examining the witnesses who deposed against him, and he produced many witnesses in his defence.

In the result Lieutenant Sandford and Gopalrao Hurry concurred in reporting that the charge had been established, and that the child put forward by Khan Mahomed as his son, namely, the present plaintiff, was not his child, but the child of Manik.

[452] The report of Lieutenant Sandford and the evidence taken by him were transmitted by the Magistrate of Satara to Mr. Ellis, described as the Acting Revenue Commissioner for Alienations, and were by him forwarded to the Government at Bombay. Mr. Ellis concurred in the view of Lieutenant Sandford, and he deprecated putting Khan Mahomed and the others concerned on their trial, and for reasons which he gave he did not recommend the confiscation of his saranjam, but suggested that the name of Khan Mahomed be struck off the list of Sardars, and that he be deprived of all the honorary privileges enjoyed by persons of his rank, the only exception in his favour being the retention of the arrangement then in force, whereby a portion of his saranjam was assigned to his creditors and the balance allowed to him for subsistence. In a subsequent letter of Mr. Ellis to the Secretary to Government, dated the 16th April 1858, he suggested that the Government should declare that, even if Khan Mahomed "should leave a legitimate son, the saranjam will not be continued to him." This recommendation was ultimately, on the 5th April 1860, adopted by the Government and communicated in a letter of that date to the Revenue Commissioner for Alienations, Captain T. A. Cowper. This resolution was communicated to Khan Mahomed, who thereupon, on the 22nd October 1860, petitioned the Governor in Council to review the proceeding.

The petition was referred to Mr. Inverarity, the Collector at Satara, who on the 21st March 1861, reported that he was not of opinion that Khan Mahomed had succeeded in shaking the validity of the evidence which had been brought forward, and that he did not recommend that a fresh inquiry be granted. And on the 8th April 1861, Mr. Forbes, the Acting Secretary to the Government, informed Mr. Inverarity, that, on a review of all the circumstances of this case, His Excellency the Governor in Council was of opinion that no reasons had been advanced by Khan Mahomed which would justify the grant of a fresh inquiry, and that the decision which he appealed against must therefore be regarded as final. Communication to this effect was directed to be made to Khan Mahomed.

[453] In 1863 Khan Mahomed again appealed to the Governor in Council, and his memorial was referred to the Duke of Argyll, Secretary of State for India in Council, who, on the 26th October 1871, declined to re-open the case.

Khan Mahomed died on the 31st December 1872. It then became necessary to determine to whom his saranjam should be granted. Amongst the candidates was Shekh Ajmodin, the present respondent, a descendant of Shekh Abdul Khan, the half-brother of Shekh Mahomed II. This led to a Resolution by the Government, dated the 23rd October 1873, "that the Agent for Sardars should be requested to investigate judicially, and after due notice to all parties concerned, whether Shekh Ajmodin is under Mahomedan law the legitimate successor to the headship of the family, either by adoption or descent."

Baron Larpent, the Agent for Satara, in pursuance of the Resolution of the 23rd October 1873, proceeded to investigate judicially the questions referred to him after due notice to all parties concerned. Amongst the parties who appeared before him was Sultan Khan Sani, claiming to be the son of Khan Mahomed.

On the 28th November 1873, Baron Larpent made his report. The important passages are as follows:—"The fourth issue remains for decision, *viz.*, Is Ajmodin, under Mahomedan law, the legitimate successor to the headship of the family of Shaik Khan Mahomed? I think that there can be no doubt he is not. As I have already said, Shaik Khan Mahomed left a daughter, and she has sons, and these sons are nearer the head of the family than the son of a

daughter of Shaik Abdul Kadar. The decision as to who should be recognized by Government as head of this family does not, in my opinion, rest on a consideration of who may be the next of kin to Shaik Khan Mahomed under Mahomedan law. Government appears to me to have decided in their letter No. 1497, of 5th April 1860, that Shaik Khan Mahomed's branch should forfeit all right to succeed to the estate. Paragraph 6 is as follows:— 'Shaik Khan Mahomed will not probably have another son of his own loins, but the Right Honourable the Governor in Council concurs with [454] Mr. Ellis in considering that the Waikar should be told that, even if he have a son, that son will not be allowed to succeed..... The forfeiture was imposed on account of the fraud practised by Shaik Khan Mahomed. His name also was struck off the list of Sardars, and although subsequently the name was re-entered, for certain reasons the order of forfeiture was not rescinded. It appears to me, therefore, that any property, the succession to which Government has power to regulate, should go to Shaik Abdul Kadar's heir, Ajmodin, both on the grounds of the former decision, and because of the great wrongs which Khan Mahomed inflicted on his brother.' "

On the 27th March 1874, the Government confirmed Baron Larpent's report in the following terms:—

"Resolution.—The proceedings of the Agent for Sardars are approved, and for the reasons given by Baron Larpent, Shaik Ajmodin should be recognized as the head of the family, to whom the saranjam should be continued. To avoid disputes the allowances for maintenance of the widows of the deceased Shaik Khan Mahomed and Shaik Abdul Kadar, and of any others who have a claim for maintenance on the estate, should be settled by order of Government after receiving the recommendation of the Agent."

"The allowances now paid to Shaik Rahmooden and to Rahimanbee, under Government letter No. 1293, of 28th March 1861, should be continued."

And on the 18th June 1874, Lord SALISBURY, as Secretary of State in Council, expressed the Government's approval of the above Resolution in these terms:—

"In reply to the letter of your Excellency's Government in this Department No. 17, of the 4th May 1874, in which you report the death of Khan Mahomed Waikar, and the nomination by you of his kinsman Ajmodin, a lineal descendant of the first British grantee, as the head of the family, to whom the saranjam should be continued, I have to inform you that I see no objection to this arrangement. Shaik Khan Mahomed's fraud in endeavouring to obtain the succession of a supposititious child [455] having been punished by the exclusion of his own progeny from the succession, Her Majesty's Government can only express their hope that the branch of the family now installed may prove itself worthy of your selection."

In pursuance of these Resolutions the whole of the jaghir and inam incomes were made over to Sheikh Ajmodin, and the agent and the administrators of the estate which had been taken into the hands of the Government, called on all persons to acknowledge him as owner. On the 6th October 1876, Colonel Etheridge, the Alienation Settlement Officer, reported as follows:—

"He (Colonel Etheridge) is of opinion that as Government have sanctioned the adoption, the whole estate intact, saranjam and inam, as restored after the war, under the treaty of 3rd July 1820, is continuable as a guaranteed estate to the adopted son (Ajmodin) as the head of the family, and should be entered in the accounts accordingly, the same as all other treaty estate of mixed saranjam and inam."

On the 6th November 1876, Colonel Etheridge's report was confirmed by the Government in the following Resolution :—

"The suggestions of the Alienation Settlement Officer are approved, and should be carried out."

Thus it appears that the Government, on the death of Khan Mahomed, resumed the saranjam held by him, and re-granted it to Ajmodin, on the ground that the Government has the right to resume jaghirs. It is not to be supposed that this right would be exercised capriciously; but, assuming it to exist, it would not be competent for any Court to review this decision of the Government on the ground that the reasons upon which it proceeded were erroneous. This Board, therefore, does not feel called upon to express any opinion upon the question whether the spurious birth of Sultan Sami has been established. Their Lordships, however, see no reason to doubt that the inquiry by Lieutenant Sandford was conducted in a judicial manner, and that full opportunity was given to the accused to cross-examine the witnesses called against him, and to call witnesses in his favour. [456] The good faith of Lieutenant Sandford and his coadjutor, Gopalrao Hurry, has not been called in question, and the various persons whose duty it has been to consider the findings of those officials have arrived at the conclusion that there was no ground to set aside those findings. Their Lordships are of opinion that the question to whom a saranjam or jaghir shall be granted upon the death of its holder, is one which belongs exclusively to the Government, to be determined upon political considerations, and that it is not within the competency of any legal tribunal to review the decision which the Government may pronounce. This principle is clearly expressed, not for the first time, in Bombay Act VII of 1863, section 2, clause 3, and is recognized in cases where the question has been raised.

Thus far as to the saranjams claimed by the appellant.

It has been contended that a different question arises with regard to the inams. Their Lordships, however, are of opinion that no distinction can be drawn between the inam and the other property in question. As has been pointed out, the sanad of 1785 included the inam villages and lands with the mokasa as parts of one saranjam for the support of troops. The effect of the treaty of the 3rd July 1820, was to continue to Shekh Mira the whole of the property, including the inam, as a personal and military jaghir. This was done by the Government on political considerations, and the tenure thereby created was political. This was the view taken by the Government in 1876, when it adopted the report of the Alienation Settlement Officer, that "the whole estate intact, saranjam and inam, as restored after the war under the treaty of 3rd July 1820, is continuable as a guaranteed estate to the adopted son" (Ajmodin) "as the head of the family."

Their Lordships therefore concur in the opinion expressed by the Governor in Council that a mixed estate of saranjam and inam was granted by the treaty of July 1820, to be held on the same political tenure, and passed intact to the person whom the Government might recognize as the head of the family, and that it is not competent for any Court of law to dispute it.

[457] In this view of the case it is unnecessary to consider the various other questions which have been discussed on the argument of this appeal.

Their Lordships will humbly report to Her Majesty that the decision of the Governor in Council be affirmed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *Blount, Lynch and Petre.*

Solicitors for the Respondent:—Messrs. *Burton, Yeates, Hart and Burton.*

NOTES.

[As regards the nature of the Saranjan title, see also (1903) 5 Bom. L. R., 983 at 986; (1909) 34 Bom., 329 at 339.]

[17 Bom. 457]
ORIGINAL CIVIL.

The 27th January, 1893.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Dadabhoy Dajibhoy Baria.....Plaintiff
versus
Pestonji Merwanji Barucha.....Defendant.*

Contract—Consideration—Compromise of a bona fide claim & good consideration—Agreement to lend money on mortgage—Delay in completion of agreement—Subsequent agreement to pay interest from a certain date—Consideration for such agreement—Right to rescind—Time of essence of contract—Suit by lender against borrower.

On 31st August 1891, the plaintiff agreed to lend the defendant Rs. 30,000 on a mortgage. By the agreement the mortgagor (defendant) was to clear the title, and the time fixed for completion of the agreement was eight days from its date. The mortgage was not completed within the stipulated time, in consequence of the non-production of the title-deeds by prior mortgagees, who were to be paid off out of the money to be advanced by the plaintiff. On the 9th September 1891, the plaintiff's solicitors wrote to the defendant reminding him that the time for completion had expired, and stating that the plaintiff would require interest to be paid on the money which he had with him lying idle on the defendant's account. On the 24th September 1891, the plaintiff formally tendered the Rs. 30,000 to the defendant, but as no mortgage-deed was then ready for execution the money was not then paid. The plaintiff was always ready and willing to advance the money, but in consequence of the defendant's delay he insisted on interest being paid from the 21st September 1891. The title-deeds were ultimately produced at the end of November or the beginning of December, and on 7th December 1891, the draft mortgage was sent to the defendant for approval. It contained a clause stipulating for payment of interest from 21st September 1891. On the 9th Dec-[458]ember 1891, the plaintiff had an interview with the defendant. The two points then discussed were (1) what time after due date should be allowed to the defendant (mortgagor) for payment of interest; (2) whether interest on the principal sum should run from the 24th September 1891. On the first point the plaintiff gave way, allowing defendant fifteen days instead of eight as originally provided. As to the second point, he declined to advance the money unless interest was paid from the 24th September 1891. The defendant ultimately agreed to this. The mortgage-deed was duly engrossed, with a stipulation for payment of interest from the 24th September 1891, and the 26th January 1892, was fixed as the day for execution. On that day, however, one of the defendant's daughters who had to execute the deed was absent, and the plaintiff refused to advance the money until her signature was obtained. Subsequently the defendant refused to sign the deed on the ground that it contained the clause for payment of interest from 21st September 1891. He contended that he was not liable to pay interest from that date. The plaintiff brought this suit, claiming Rs. 1,865-12-0 as damages for the defendant's breach of agreement. The lower Court held that although the original agreement of 31st August 1891, mentioned no date from which interest should

* Small Cause Court Suit, No. 259—17662 of 1892.

run, the defendant on the 9th December 1891, had agreed to pay it from 24th September 1891, and had made no objection on the point until February 1892. The defendant contended that, if such an agreement was made on the 9th December 1891 it was without consideration, but the Court held that the plaintiff was at that date at liberty to rescind the agreement altogether, and that he had consented not to rescind in consideration of being paid interest from the 24th December 1891. The lower Court accordingly passed a decree for the plaintiff.

Semble that time was not of the essence of the contract, but

Held, that in any case, under the circumstances, there was consideration for the agreement made by the defendant to pay interest from the 24th September. The plaintiff clearly regarded himself as entitled to rescind, and at the defendant's request agreed to forbear to do so if the defendant would consent to pay interest from the 24th September 1891. The claim of the right to rescind was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an inducement to the defendant to agree to the plaintiff's terms, and the principle laid down in *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D., 266, applied.

CASE stated for the opinion of the High Court under Section 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit filed by the plaintiff to recover a sum of Rs. 1,865-12-0 as damages alleged to have been suffered by him in consequence of the defendant's breach of agreement to borrow from the plaintiff a sum of Rs. 30,000 on the security of three properties belonging to the defendant.

[459] 2. The original agreement for mortgage, as to which there is no dispute, bears date the 31st August 1891, and provides for a loan of the sum of Rs. 30,000 with interest at the rate of 9 annas per cent. per mensem. The mortgagor was to clear the title, and the time fixed for the completion of the agreement was eight days from its date.

3. The facts of the case, as found by me, were as follows:— The mortgage was not completed within the time stipulated, in consequence of the non-production of the title-deeds by prior mortgagees, who were to be paid off out of the moneys advanced by the plaintiff. The same solicitors, Messrs. Little, Smith, Frere, and Nicholson, were acting for both parties and continued so to act up to the end of January 1892.

4. On the 9th September 1891, the solicitors sent a letter to the defendant reminding him that the time for completion had expired, and saying that the plaintiff would require interest to be paid on the money which he had with him lying idle on the defendant's account. It was, however, thought that a formal tender should be made, and the sum of Rs. 30,000 was accordingly offered to the defendant on the 24th September 1891, but as no deed was then ready for execution, it was not paid. The idea of tender was no doubt erroneous, but it was from the date of the tender, 24th September 1891, that the plaintiff claimed that interest should run. Putting aside the question of tender as immaterial, I considered that it was nevertheless open to the plaintiff to decline to carry out the agreement, the time for completion of which had gone by, unless the defendant agreed to pay interest on the money from that date, and this was in effect the position taken up by the plaintiff.

5. There was further delay owing to the non-production of the title-deeds by the defendant, on whom it lay to clear the title. There was no imputation of laches on the part of the plaintiff, who was always ready and willing to advance the money, but in consequence of the defendant's delay, insisted on interest being paid thereon from the 24th September 1891.

6. The deeds were ultimately procured at the end of November 1891, or beginning of December, and on the 7th Dec- [460] ember 1891, the draft mort-

gage was sent to the defendant for his approval. This draft contained a stipulation for the payment of interest from the 24th September 1891. The draft was read over to the defendant by his son Cowasji Pestonji (they both read and understood English well), and certain pencil alterations were made by Cowasji: *inter alia* the words "24th day of September 1891," were scored through with a pencil line and other words written in pencil above them.

7. On the 9th December 1891, the defendant and Cowasji brought plaintiff to Messrs. Little, Smith, Frere and Nicholson's office, where the matter was discussed in the presence of Byramji Darasha, the managing clerk. The two main points in dispute were (1) as to what time after due date should be allowed to the mortgagor for payment of interest, and (2) whether interest on the principal sum should run from 24th September 1891. On the first point the plaintiff gave way, allowing the defendant fifteen days instead of eight as originally provided. With regard to the second point, he declined to accede to the defendant's request, or to advance the money on any other terms, and the defendant ultimately agreed to pay interest from the 24th September 1891. The pencil alterations in the draft were then written in red ink by Cowasji, except with regard to the words "24th day of September 1891," where the pencil-line and words written above were rubbled out by him. Cowasji then endorsed on the draft "approved as within altered for self and others, 9-12-91" and this was signed by the defendant.

8. There was some further delay on the part of the defendant in getting the necessary power of attorney from one of his prior mortgagees who was absent from Bombay, but ultimately the 26th January 1892, was fixed as the day for execution. The mortgage-deed was engrossed and contained the stipulation for payment of interest from 24th September 1891. On the 26th January 1892, the defendant, his wife, sons and daughters (except Perozbai) attended at the office of Messrs. Little, Smith, Frere and Nicholson to execute the deed, which they were prepared to do. As, however, Perozbai was absent, the plaintiff, acting on the advice of Mr. Nicholson, declined to advance the money until her [461] signature was obtained, and another day was to be fixed for execution. No mention was at that time made of the date from which interest was to run, nor did the defendant or his sons raise any objection to the form of deed as engrossed.

9. In the beginning of February the defendant consulted other solicitors, but it was not until the 13th February 1892, when they had written for and obtained a copy of the agreement, that the present contention was raised that the defendant was not liable to pay interest from the 24th September 1891. It is true that the agreement of the 31st August 1891, made no mention of the date from which interest should run, but I considered that that did not prevent the parties from subsequently making a verbal agreement which should be binding on the defendant. I found, therefore, that in this case the defendant did, on the 9th December 1891, agree to pay interest on the principal sum from the 24th September 1891, and that he made no objection to such agreement until the 13th February 1892. It was argued that such agreement if so made was without consideration, but I held that the fact of the plaintiff being at liberty to rescind the agreement and consenting not to do so on payment of the interest, was sufficient consideration for such verbal agreement.

10. It was further argued for the defendant that no suit for damages would lie in cases of this kind, and the case *Bain v. Fothergill*, 7 H. L. C., 158, and similar cases were cited. I held, however, that the law on such matters

in this country was as laid down in sections 73* and 74† of the Indian Contract Act, IX of 1872, and for the proposition that such cases fall within the purview of those sections I was bound by the decision of FARRAN, J., in the very similar case of *Datubhai Ebrahim v. Abubaker Moledina*, I. L. R., 12 Bom., 242.

11. In this case I considered that damages should be awarded on the footing of the loss of interest sustained by the plaintiff from the 24th September 1891, until such date as he could be reasonably expected to be able to invest his money on a similar security. FARRAN, J., allowed four months from the date on which the defendant ultimately repudiated the contract, and I accordingly allowed a similar period, namely four months, from [462] the 19th February 1892. The plaintiff's money or the major portion of it was on current account with the Hongkong and Shanghai Banking Corporation, where interest at the rate of 2 per cent. per annum was allowed up to the 31st December 1891, and 1 per cent. after that date. I accordingly deducted this from the contract rate of 6½ per cent. and awarded to the plaintiff Rs. 1,197-11-2, being interest on Rs. 30,000 at 4½ per cent. per annum from 24th September 1891, to 31st December 1891, and at 5½ per cent. per annum from 1st January 1892, to 19th June 1892. I also awarded the plaintiff his costs of the abortive loan, the amount of which it was agreed should be the amount of the bill of costs when taxed, including the costs of taxation it allowed. I also certified the plaintiff's professional costs at Rs. 180.

12. The defendant's counsel requested me to state a case for the opinion of their Lordships on the following questions:—

(i) Whether the defendant was bound to execute the engrossment of the mortgage-deed in the form presented to him on the 26th January 1892?

(ii) If yes, whether he is liable to the plaintiff in any and what damages?

And I accordingly made my judgment contingent on such opinion.

13. The defendant has deposited Rs. 1,800 in Court as security for the plaintiff's claim together with Rs. 50 to meet the costs of reference.

* [Sec. 73 :—When a contract has been broken, the party, who suffers by such breach, is entitled to receive from the party, who has broken the contract, compensation for any loss or damage, caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person, injured by the failure to discharge it, is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

Explanation :—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract, must be taken into account.]

Title to compensation for breach of contract in which a sum is named as payable in case of breach.

† [Sec. 74 :—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.

Exception :—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act, in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation :—A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested.]

Anderson for the Defendant:—The defendant has not committed a breach of the agreement of 31st August 1891, and is, therefore, not liable to the plaintiff. Under that agreement he was not bound to pay interest from the 24th September 1891, and he was, therefore, justified in refusing on the 26th January 1892, to execute a mortgage-deed which provided that he should do so. It is said that there was a new agreement on the 9th December 1891, by which he agreed to pay the interest. We deny there was such an agreement. But, in any case, the plaintiff gave no consideration for it, and it was, therefore, invalid. It is suggested that the plaintiff was entitled to rescind the first agreement, and that he agreed not to do so if the defendant would pay interest. That is the alleged consideration for the new agreement. But the plaintiff was not entitled to rescind, for time was not and had never been made of the essence of the contract. So there was no new agreement, and the first agreement was still in force in January 1892, and the defendant was not, therefore, bound to execute the mortgage-deed which was prepared, and the plaintiff is not entitled to compensation. Section 55 of the Contract Act (IX of 1872) does not apply to contracts of sale or mortgage of land. Moreover, defendant's promise to execute a mortgage in eight days was dependant on the plaintiff's promise to have the deed ready within that time. He cited *Pollock on Contract* (3rd Ed.), p. 478; *Bain v. Fothergill*, 7 II. L. C., 159, *Rowe v. The London School Board*, 57 L. T., 132, *Dart's Vendors and Purchasers* (6th Ed.), pp. 483, 1083.

Lang and Rivett-Carnac for the Plaintiff.—The Court is bound by the finding of the Chief Judge that there was a new agreement for good consideration on the 9th December 1891. The mortgage-deed to be executed was necessarily prepared in accordance with that new agreement, and the defendant was bound to execute it.

[SARGENT, C. J.:—Do you say time was of the essence of the contract?]

We say it was, but we say the agreement of the 9th December 1891, was good whether or not. Even supposing the plaintiff had no legal right to rescind the original agreement, yet if he *bona fide* believed he had, and threatened to do so, unless he were allowed the additional interest, and if under those circumstances the defendant agreed to the new terms, the agreement then made is binding—*Miles v. New Zealand Alford Estate Co.*, 32 Ch. D., 266; *Callisher v. Bishoffschem*, L. R., 5 Q. B., 449.

Sargent, C. J.:—The answer to the first question, whether the defendant was bound to execute the mortgage tendered to him by the plaintiff on the 26th January 1892, must depend upon whether the agreement by the defendant on

[Sec. 55:—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and

Effect of failure to perform at fixed time in contract in which time is essential. fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not, the intention of the parties that time should be of the essence of the

Effect of such failure when time is not essential. contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract, voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of

Effect of acceptance of performance at time other than that agreed upon. such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisee of his intention to do so]

the 9th December [464] 1891, that the mortgage to be executed should contain a clause that interest should run from the 24th September 1891, was binding on him. The Chief Judge of the Small Cause Court has found that the plaintiff on that day declined to accede to the defendant's request to advance the money unless the defendant consented to the above clause being inserted in the document, but it is said that there was no consideration for the agreement, and, therefore, that the defendant, if he thought proper, could change his mind and decline to execute a mortgage, except in the form prescribed by the contract, which provided that interest should run from the execution of the mortgage.

It appears from Mr. Chitty's judgment that he considered that the eight days mentioned in the contract was of the essence of the contract, and if this were so, it cannot be doubted that the plaintiff's forbearance to treat the contract as at an end on the 9th December, if the defendant agreed to the insertion of the clause, would be a good consideration for such agreement. But it was argued that time was not of the essence of this contract. We may remark that the case in I. L. R., 12 Bom., 242, which was referred to in argument by the plaintiff, has no bearing on that point. In that case subsequently to the execution of the contract, the parties definitely agreed that the contract should be finally settled on the 1st March 1887, and the only question for decision was as to the compensation the plaintiff was entitled to by the defendant's default in performing his part of the contract on that day. If it were necessary to decide the question, we can scarcely doubt that in such a contract it must be presumed that it was not the intention of the parties that the eight days, mentioned in it, should be of the essence of the contract. However, we think that under the circumstances of this case, it is not material to decide the question, as the case of *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D., 266, shows that there was good consideration for the agreement, although the plaintiff may not have had the strict right he claimed to have on the 9th December of treating the contract at an end. The Judges in that case, although differing as to the application of the rule under the circumstances of the case, were [465] all agreed that the forbearance to enforce a real *bond fide* claim is a good consideration for an agreement, although not one which the Court would have given effect to. Here, although the judgment of Fry, J., in *Green v. Sevin*, 13 Ch. D., 589, shows that, strictly speaking, the plaintiff's right on the 9th December was not to rescind the contract, but to give the defendant notice that he would rescind if the defendant did not complete within a reasonable time (which in the present case would have been a very short period, as the matter has been going on ever since 31st August), still the plaintiff clearly regarded himself as entitled to put an end to the contract, and agreed at the defendant's request to forbear to do so if the defendant would consent to pay interest from the 24th September 1891. The claim of the right to rescind at once was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an inducement to the defendant to agree to the plaintiff's terms. We think that under these circumstances the principle laid down in *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D., 266, applies, and that there was, therefore, good consideration for the agreement of the 9th December 1891.

The first question must be answered in the affirmative. As to the second question it cannot be doubted that the plaintiff became entitled to compensation when the defendant finally refused to execute the mortgage with the added clause to which he had agreed, and no argument was addressed to us to show that the compensation was improperly assessed by the Small Cause Court either in manner or account.

The plaintiff to have his costs of the reference, to be taxed by the Taxing Master as on the original side of the High Court.

Attorneys for the Plaintiff:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for the Defendant:—Messrs. *Ardesir, Hormasji and Dinsha.*

NOTES.

[A *bona fide* compromise of a claim, whether well-founded or not is a good consideration.—(1910) 6 I. C., 651, (1913) 20 I. C., 429 (oudh).]

[466] ORIGINAL CIVIL.

The 10th March, 1893.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY

Foolibai.....(Original Defendant) Appellant

versus

Rampratab Samratrai and another.....(Original Plaintiffs) Respondents.*

Practice—Adding a defendant in a suit where leave to sue under Clause 12 of the Letters Patent, 1865, was necessary—Alternative liability—Order to add new defendant—Appeal against such order by original defendant.

The plaintiff filed this suit against the defendant Foolibai, alleging that she had a firm and carried on business at Sihore in the territory of Bhopal. Before the suit was filed, leave was duly obtained under clause 12 of the Letters Patent, 1865. In her written statement Foolibai denied that she was the owner of the Sihore firm, or that she was responsible for any of its dealings with the plaintiffs. She alleged that the Sihore firm had belonged to her son Poonamechand who died in *Samvat* 1913, leaving a daughter named Goolibai, a minor, who was still living. The plaintiff then obtained a summons calling on the defendant Foolibai to show cause why the plaint and proceedings should not be amended by adding the name of Goolibai as a party-defendant. The summons was made absolute, and an order was made to add Goolibai as a defendant. The defendant Foolibai appealed, contending that the effect of adding a defendant would be to institute a new suit against Goolibai without obtaining the necessary leave under the Letters Patent. She relied on *Rampurtab v. Premeukh Chandamal*, I. L. R., 15 Bom., 93.

Held, dismissing the appeal, that the defendant Foolibai could not appeal against the order making Goolibai a party. It might be that Goolibai might object to the order either before or at the hearing, but she only could take the objection. The defendant Foolibai could not take it for her. The case of *Rampurtab v. Premeukh Chandamal*, I. L. R., 15 Bom., 93, did not apply. In that case the proposed amendment altered the cause of action. Here it was left unaffected. On the cause of action as set forth in the plaint, leave had been given under clause 12 of the Letters Patent to sue the defendant Foolibai, and so far as she was concerned there was no objection to the form of the suit. If her allegation was true, Goolibai and not Foolibai was liable. That question would be decided at the trial.

APPEAL from an order made by the Judge in Chambers, dated 13th August 1892, directing that one Goolibai should be made a party defendant to the suit.

The suit was filed on the 12th February 1892, against the appellant (defendant), Foolibai, alone. The plaint alleged that she had a firm at Sihore in the territory of Bhopal, where she formerly carried on business under the name of Chotamal Ballaram, that the plaintiffs had large dealings with the said

* Suit, No. 76 of 1892.

[467] firm; and that in respect of such dealings a sum of Rs. 53,833 was due by the defendant to the plaintiffs. The plaintiffs prayed for judgment for that sum, or, if necessary, for an account, &c.

Before filing the suit leave was duly obtained under clause 12 of the Bombay Letters Patent, 1865.

On the 15th June 1892, the defendant Foolibai filed her written statement. She denied that she was the owner of the Sihore firm, or that she was responsible for any of its dealings with the plaintiffs. She alleged that the Sihore firm had belonged to her son, Poonamehand, who died in *Samvat* 1943, leaving a daughter Goolibai, a minor, and that Goolibai was still alive.

On receipt of the written statement the plaintiffs' attorney asked the defendant to consent to have Goolibai added as a defendant. On her refusal the plaintiffs on the 25th June 1892, took out a Judge's summons calling on her to show cause why the plaintiffs should not have liberty to amend the plaint by adding the name of Goolibai, a minor, as a party-defendant and by making such other amendments as might be necessary to be made in the plaint. On the 13th August 1892, the summons was made absolute, and an order was made to add Goolibai as a defendant and to amend the plaint and proceedings as might be necessary. From this order the present appeal was brought by the defendant Foolibai.

Vicary, for the Appellant (Defendant):—The suit has been filed against us, and for this suit leave has no doubt been obtained. But now the plaintiffs seek to add a new defendant, the effect of which would be to institute a new suit against this new defendant without obtaining leave under the Letters Patent. They cannot do this, and they cannot obtain leave now. It is when the suit is filed that leave must be obtained. It cannot be obtained afterwards—*Rampurtab v. Premsukh Chandamai*, I. L. R., 15 Bom., 93.

Macpherson, for Respondents, was not called upon.

Sargent, C. J.:—We do not think that the decision in *Rampurtab v. Premsukh Chandamai*, I. L. R., 15 Bom., 93, applies to the present case. In that case the amendment which it was proposed to make in the [468] plaint altered the cause of action, and the Court held that under clause 12 of the Letters Patent, 1865, the amendment could not be made after the suit had been instituted. Here, however, the cause of action is left unaffected. On the cause of action set forth in the plaint leave has been given under clause 12 to sue Foolibai; and so far as she is concerned there is no objection to the form of the suit, and it will go on to a hearing. In her written statement she, however, says that she is not the proper defendant, that the firm with which the plaintiffs had dealing was not hers, but her son's, and that her son is dead and has left a daughter Goolibai, who is still alive. If that be true it is clear that Goolibai is the person liable. Whether it is true or false, will be a question for determination at the trial of the case. The plaintiffs naturally wish to have Goolibai added as a defendant, so as, if possible, to obtain judgment in this suit against one or the other. It may be that Goolibai can apply to have her name taken off the record on the ground that the suit has been instituted against her without the necessary leave, or she may possibly take this objection at the hearing. We need not give any opinion on that question. Such an objection, however, can only be taken by her. Foolibai cannot take it for her. Mr. Justice FARRAN has ordered that Goolibai should be made a party, and Foolibai appeals against that order. We do not think she is the person to appeal, and we dismiss the appeal with costs.

Attorney for the Appellant:—Mr. D. S. Garud.

Attorneys for the Respondents:—Messrs. *Payne, Gilbert and Sayani*.

[469] APPELLATE CIVIL.

The 11th July, 1892.

PRESENT :

MR JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Malichand Dharamchand.... (Original Defendant) Appellant
*versus*Dalsukhram Hargovindas, Liquidator of the Gujarat Oil Mill Company,
Limited..... (Original Plaintiff) Respondent.**Company—Sue by liquidator—Limitation—Allotment of shares—Commencement of shareholder's liability—Indian Companies Act (VI of 1882), Section 125.*

The liquidator of the Gujarat Company in September 1889, sued the defendant as a registered shareholder of the company to recover a sum of Rs. 2,483 due from him in respect of his shares. The plaint set forth the particulars of demand, one of which was Rs. 250, being the amount of deposit payable before allotment on 15th July 1886, and another a sum of Rs. 250 payable on allotment on 15th July 1886. This suit was brought on 10th September 1889, and the defendant contended that the above two items of claim were barred by limitation. The lower Courts, notwithstanding the statement in the plaint, found, as a fact, that the allotment of the shares was really made in November 1886.

Held, therefore, assuming three years to be the period of limitation, that the claim was not barred. The debt due from the defendant did not become recoverable until he was registered as a shareholder.

SECOND APPEAL from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

The plaintiff, as liquidator of the Gujarat Oil Mill Company, Limited, sued to recover Rs. 2,483-12-0, (*i.e.*, Rs. 2,000 principal and Rs. 483-12-0 interest), from the defendant due as a registered shareholder of the company in respect of ten shares allotted to him.

The particulars of the claim as given in the plaint were as follows :—

	rs.	a.	p.
Deposit payable before allotment	250	0	0
Payable on allotment, 15th July 1886	250	0	0
First call, 15th November 1886	500	0	0
Second call, 20th January 1887	500	0	0
Third call, 18th April 1887	500	0	0
Total	2,000	0	0
Interest	483	12	0
	2,483	12	0

[470] The defendant (*inter alia*) as to the first two items pleaded limitation. The suit was filed on the 10th September 1889.

* Second Appeal, No. 718 of 1891.

The Subordinate Judge, relying on the decision in *The Parell Spinning and Weaving Company, Limited, in Liquidation v. Manek Haji*, I. L. R., 10 Bom., 483, found that the claim was not time-barred, and that the plaintiff was entitled to recover interest at 9 per cent. from the 4th July 1889. He found that defendant's name was not placed in the register until November 1886. He decreed the plaintiff's claim to the extent of Rs. 2,033, and rejected the rest. In his judgment he remarked as follows :-

"The list of allottees does not appear to have been prepared in pursuance of the terms of the resolution of the 10th June 1886, but only after the last application for allotment was received from Shivalal Mayachand on the 13th November 1886. The reason why no allotment was made to the defendant before the 1st of that month is obvious enough. The resolution in question only authorizes allotment of shares to those who had made applications for the same. . . . The letters of allotment appear to have been issued about the 25th June 1886, and, as the defendant's name was not placed on the register until after the 1st November following, none could have been sent to him before the latter date."

On appeal by the defendant the District Judge confirmed the decree.

The defendant then appealed to the High Court.

Starling (with Govardhanram M. Tripathi) for the Appellant (defendant).—

The lower Courts hold, on the authority of *The Parell Spinning and Weaving Company, Limited, in Liquidation, v. Manek Haji*, I. L. R., 10 Bom., 483, that the present claim is governed by six years' limitation. We contend that the limitation applicable is three years, and, therefore, the claim with respect to the first two items is time-barred. The Bombay decision relied on by the lower Courts is based upon *In re Whitehouse & Co.*, 9 Ch. Div., 595, but in that case there was merely a summons, and the liquidator had appeared in Chambers. The ordinary rule of law is that a suit is barred after three years, but a summons may be taken at any time. Again, the point involved in *In re Whitehouse, & Co.*, 9 Ch. Div., 595, was specially provided [471] for in the Company's Act (of 1862) itself. The other cases referred to in the Bombay decision are *In re National Funds Assurance Company*, 10 Ch. Div., 118, and *Whitehouse v. Jamieson*, 2 H. L. Sc., 29. In the former also a summons was taken out by the liquidator. The above cases are in our favour, and they show that a liquidator merely represents the company, and when he sues as such he can recover only what the company could have recovered.

Russell (with F. Chalk) for the Respondent (plaintiff):—A liquidator is not merely a representative of the company; he is also a representative of the company's creditors. The appellant subscribed the memorandum of association. He is, therefore, a shareholder, and as such subject to all liabilities—sections 61* and 124† of the Indian Companies Act (VI of 1882); Buckloy on Companies (6th Ed.), p. 325; Starling on Limitation, p. 291; *In re Kathiawar Trading Company* (see *Times of India*, dated 2nd May 1887).

* [Sec. 61 :—In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is say) :—]

† [Sec. 124 :—The term 'contributory' shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound up; it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory].

The position of a liquidator in voluntary winding up is set forth in section 177 of the Indian Companies Act. If it is once established that the liquidator is a trustee for the creditors of the company, then the limitation would be six years. We strongly rely upon *The Parell Spinning and Weaving Company, Limited, in Liquidation, v. Manek Haji*, I. L. R., 10 Bom., 483.

He also cited *Brighton Arcade Co. v. Dowling*, L. R., 3 C. P., 175; *In re Hull and County Bank: Burgess's case*, 15 Ch. Div., 507.

Candy, J. : - The only point taken in second appeal is that of limitation with respect to the demand for deposit and the sum payable on allotment of the shares.

In the plaint it is stated that these sums were payable—the deposit *before* 15th July 1886, and the second sum payable on allotment *on* 15th July 1886. Apparently the meaning of this date is that in June 1886, the directors decided that shares should be allotted, and that the sums due on allotment should be payable, on 15th July 1886. But it is found as a fact, by which finding this Court is bound, that the allotment of the shares in [472] question was really made in November 1886. This suit was filed in September 1889, and so, assuming three years to be the period of limitation, the suit would not be barred. For by article 9 of the articles of association the money became due on the inscription of the defendant's name as the holder of such shares. His liability may have commenced, and the debt may have accrued, when he signed the registered memorandum of association, but the debt could not become recoverable before notice was sent to him for enforcing such liability, or at least before the inscription of his name (*cf.* section 125, Act VI of 1882). Under these circumstances we confirm the decree of the District Judge with costs.

Decree confirmed.

APPELLATE CIVIL.

The 11th July, 1892.

PRESENT :

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Chhotalal Chhaganlal.....(Original Defendant) Appellant

versus

Dalsukhram Hargovindas, Liquidator of the Gujarat Oil Mill Company,
Limited.....(Original Plaintiff) Respondent.*

*Company—Suit by liquidator against shareholder—Limitation—Commencement
of liability of shareholder in respect of shares—Memorandum of association—
Subscriber to memorandum—Attestation of signature of subscriber—
Want of attestation—Irregular attestation—Indian
Companies Act, VI of 1882, Section 11.*

A suit against a shareholder to enforce liability in respect of his shares, if brought within three years from the date at which his name is inscribed in the register as the holder of such shares, is not barred by limitation.

Where a memorandum of association of a company has been registered, a subscriber cannot divest himself of his liability as a member of the company, although his signature to the memorandum may not have been properly attested. The transaction may be irregular, but it is not void.

THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

The plaintiff as liquidator of the Gujarat Oil Mill Company, Limited, sought to recover Rs. 400 and interest, Rs. 97-12-0, in all Rs. 497-12-0, from the defendant, being the amount due by him in respect of two shares held by him in the company.

[473] The defendant Sha Chhotalal Chhaganlal pleaded (*inter alia*) that the suit was time-barred. He also contended that he was not a shareholder, on the ground that his subscription to the registered memorandum of association was not duly attested. The fact was that the witness, who was said to have attested the defendant's signature, had attested other signatures written above that of the defendant, and had written his name in the parallel column. Instead of again writing his name in that column opposite the name of the defendant, the witness had merely made two marks („) commonly used to signify "ditto."

The Subordinate Judge allowed the plaintiff's claim to the extent of Rs. 400 only, and disallowed it with respect to interest.

On appeal by the defendant, the District Judge in confirming the decree made the following observations :—

"It is established beyond all reasonable doubt that the defendant's signature appears below the registered articles of association. It is, however, contended that his signature has not been attested as required by law. It is true that the attesting witness has not signed his name in full against the signature of the defendant, but it appears that the witness attested the names just above and below that of the defendant, and the defendant's signature is

* Second Appeal, No. 732 of 1891.

attested in exactly the same way as those signatures. It appears to me that the requirements of law have been fully satisfied. * * Having become a shareholder by signing the registered articles of association, the defendant cannot divest himself of his legal liability."

The defendant appealed to the High Court.

Chimanlal Hiratal Setalvad for the Appellant (defendant):—In this case, in addition to the point of limitation argued in *Malichand v. Dalsukhrum*, ante, p 469, there is the question of attestation. Under section 11* of the Indian Companies Act (VI of 1882), attestation is necessary for each signature. The defendant's signature is not attested. The marks indicating "ditto" are not a sufficient attestation—*D. Fernandez v. R. Alves*, I. L. R., 3 Bom., 382; *Nitye Gopal Sarkar v. Nagendra Nath Mitter*, I. L. R., 11 Cal., 429. There are cases [474] which lay down that a mark is a sufficient attestation, but the mark must be some distinguishing mark, and not mere dots. The provisions of attestation and registration are made as a safeguard against fraud and deception, and, therefore, it is imperative that the attestation should be made in the usual manner.

The provisions of section 11 of the Companies' Act have not been complied with, and the defendant has not become a shareholder of the company.

Russell (with *F. Chalk*) for the Respondent:—Section 11 does not say that the signature of each shareholder shall be attested by a witness. It merely lays down that the signatures shall be attested by one witness at least. In the present case the mark (dots) made by the witness is a sufficient attestation. We further say that for the purpose of the present case no attestation is necessary, because when a memorandum is subscribed to and registered, the person subscribing cannot divest himself of liability—section 45† of the Indian Companies Act (VI of 1882).

Candy, J.:—Two points have been raised in second appeal: (1) first that the defendant cannot be held to be a shareholder at all, because his subscription to the registered memorandum of association was not duly attested according to law; (2) second, that the claim is barred by limitation.

The point of limitation may be disposed of at once. Assuming three years to be the period of limitation, it is clear on the face of the plaint that three years had not elapsed, when the suit was first brought, since the date when defendant's name was inscribed in the register of members as the holder of such share as he had agreed to take.

With regard to the first point, we are of opinion that, assuming the mark made to represent the signature of the attesting witness to be bad, it would nevertheless be very difficult to hold that the plaintiff, who is proved to have signed the registered memorandum of association, is not a member. The

* [Sec. 11:—The memorandum of association shall be signed by each subscriber in the presence of, and be attested by, one witness at the least. It shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors and administrators, a contract to observe all the conditions of such memorandum subject to the provisions of this Act.]

Signature and effect of memorandum of association.

† [Sec. 45:—The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of any company whose memorandum they have subscribed, and the company, on the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed with a company under this Act to become a member of such company, and whose name is entered on the register of members, shall be deemed to be a member of the company.]

Definition of 'member.'

language of section 11 of Act VI of 1882, which follows the English Act, is somewhat peculiar. "The memorandum of association shall be signed by each subscriber in the presence of, and be attested by, [475] one witness at the least." In its strict grammatical sense this would mean that the memorandum of association shall be attested by one witness at the least, not that the signature of each subscriber shall be attested by one witness at the least. Form A in Schedule II of the Act contemplates one witness attesting at the foot of the memorandum the signatures of all the subscribers. However that may be, and whatever weight the consideration of the question might have before the registration of the memorandum, we think that when the memorandum has been registered, a subscriber cannot divest himself of his liability. The transaction may have been irregular, but it is not void. Under these circumstances we confirm the decree with costs.

Decree confirmed.

[17 Bom. 475]
APPELLATE CIVIL.

The 27th July, 1892.

PRESENT:

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Vishvanath Bhikaji.....(Original Plaintiff) Appellant
versus

Dhondappa and others.....(Original Defendants) Respondents'.

*Landlord and tenant—Inamdar—Enhancement of rent—Landlord's right of
ejectment—Ejectment for non-payment of enhanced rent—Plea of permanent
tenancy—Decision of Judge not based on evidence given in the case—
Practice—Second appeal—Finding of fact when binding in second
appeal—Sheri and khata lands—Rights of khata tenants not
holding under express contract, how proved—Evidence as
to similar tenants in similar villages admissible.*

In a suit for ejectment for non-payment of enhanced rent the defendants pleaded (1) that they were permanent tenants, (2) that the plaintiff had no power to enhance, (3) that the enhancement by the plaintiff was unreasonable. The lower Courts held that the defendants were permanent tenants, but were bound to pay a reasonable rent. Their decision was not based on evidence given in the case, but on what was termed a "well-known distinction between the *sheri* or private lands of an inamdar and the *khata* or *rayatwar* lands held by recognised tenants." The exercise of certain rights of transfer or inheritance, &c., were regarded as evidence of fixity of tenure at a reasonable rent. On second appeal by the plaintiff to the High Court it was argued that the District Court having found, as a fact, that the defendants were permanent tenants bound to pay a reasonable rent, the High Court in second appeal was bound by that finding.

[475] *Held*, that the case should be remanded for proper enquiry. No doubt, if the appeal in the District Court were conducted as if all the facts recorded by the Subordinate

Judge were admitted, the plaintiff could not in second appeal question these facts. But it did not appear that it was admitted that the distinction drawn between *sheri* and *khata* tenants was correct, or that every *khata* tenant, as such, exercised the rights described by the Subordinate Judge. Under the circumstances it was clear that the decision of the District Judge was based neither on evidence nor admissions, and was, therefore, not binding in second appeal.

In determining the rights of *khata* tenants who held under no express contract, the best evidence no doubt, if possible, would be the evidence of custom in the particular village in question, but evidence of similar tenants in similar villages would not be excluded.

Mirasdars in an inam village cannot always claim to hold at a fixed rent. An inamdar can enhance their rents within the limits of custom.

SECOND APPEAL from the decision of Dr. A. D. Pollon, District Judge of Belgaum.

Suit to recover possession of fields.

The plaintiff sued to recover possession of two fields (Survey No. 12 and a specified portion of Survey No. 175) situate in the village of Zunzurvad, alleging that they belonged to him as his inam; that they had been in the possession of the defendants as yearly tenants at a rent of Rs. 38, but that he had given them notice; that he called upon them to pay an enhanced rent of Rs. 130 and to execute a rent-note to that effect. The defendants had refused the notice, and the plaintiff, therefore, brought this suit.

The defendants denied that they were yearly tenants, and contended that they were not liable to enhancement of rent; that their family had held field No. 12 since 1820, in which year the village had been granted as *saranjam* to the family of Chinchnikars; that field No. 175 had been given to them by one of that family on a perpetual lease in or about the year 1844; that the original rent of Survey No. 12 was Rs. 16, which was subsequently enhanced to Rs. 26; that the rent of the other field was fixed at rupees twelve, and was never enhanced; that the plaintiff's demand was extortionate, and was made with a view to deprive them of their holdings; that they were willing to pay such proper and equitable rent as might be fixed by the Court; and [477] that the plaintiff was not entitled to eject them so long as the rent was paid.

The Subordinate Judge found that the plaintiff was not entitled to enhance at his pleasure, but that he might demand a reasonable rent. As there was no satisfactory evidence on the point he ordered that the questions whether the rent now claimed by the plaintiff was excessive, and, if so, what would be the proper amount, should be determined in execution. He made a decree accordingly. In his judgment he made the following observations:—

"We should bear in mind that the fields are situate in an inam village; the defendants have been in possession for forty years and upwards, paying practically an unchanged amount of rent. Plaintiff wants to treat them as mere annual tenants liable to be evicted after due notice, but they appear to me to possess some superior rights. It is a notorious fact that the lands of an inam village are divided into *sheri* ones, which stand under the inamdar's name, and *khata* ones under the names of separate holders. Regular heirship proceedings take place in respect of the latter, but the former are not dealt with in this way. The rents of the former are collected directly by the inamdar, while there is a legal prohibition against such direct collection of those of the latter. The transfer of the *khata* of the second class requires the passing of the *kabulayat* and *razinama*, while such is not the case of the *sheri* class. The Registry Office bears abundant testimony that the *khata* fields are often mortgaged, sold, purchased, sub-let and otherwise disposed of by their holders, and this exercise of those legal rights has never been challenged

or interfered with by the inamdar. An annual tenant cannot exercise any such rights for the simple reason that he has no interest in his holding at the expiry of the year. These considerations sufficiently differentiate a registered tenancy from an annual one, and must give more security to it than what can be claimed by the latter.

"In disposing of the question of limit of enhancement, I forgot to state an important point favourable to defendants. It will be seen that these fields were taken up at a time when the holder had a life interest in them, and they were liable to be resumed [478] by Government after the demise of the holder. So defendants' ancestors might reasonably be presumed to have entered into possession under a belief that their eventual landlord, *viz.*, Government, would extend to them the same rights as would be given to its other tenants, and that a liberal margin of profit would be allowed to them at the time of enhancement. The subsequent summary settlement could not affect this understanding to which the present inamdar is, therefore, bound to give effect."

The plaintiff appealed. The District Judge confirmed the decree with slight variations which it is not necessary to state for the purpose of this report.

The plaintiff then preferred a second appeal.

Vasudeo Gopal Bhandarkar, for the Appellant (Plaintiff):—The defendants have been the plaintiff's tenants from the year 1811. He has been an inamdar for a much longer time. The lower Courts have held that because the defendants have held possession for a long time, and have been paying a fixed rent, they are permanent tenants. But this does not prove permanent tenancy—*Narayanbhat v. Davlata*, I. L. R., 15 Bom., 647; *Gangabai v. Kalapa*, I. L. R., 9 Bom., 419. The lower Courts have based their decisions on alleged facts, of which no evidence was given, and on inferences from those facts. There is no evidence of permanent tenancy. The lands in dispute are *rayatwar* lands. The plaintiff gave notice to the defendants to pay enhanced rent, or to vacate the lands, and they having failed to do either the plaintiff is entitled to eject them. *Endar Lala v. Lallu Hari*, 7 Bom. H. C. Rep., 111, A. C. J., is in point.

Manekshah J. Taleyarkhan, for the Respondents:—The lower Courts have found as a fact that the lands in dispute are *khata*, and not *sheri*, lands, and this finding cannot be upset in second appeal. In *khata* lands in inam villages the tenants have, all over the country, the same hereditary rights which the tenants in Government *khata* land possess. The Subordinate Judge has in his judgment given in detail the rights of such tenants. The conduct of the plaintiff estops him from raising any contention with respect to our rights. In his appeal to the District Court [479] he did not object that the Subordinate Judge had, in the absence of evidence, relied upon his own knowledge, and held that defendants are permanent tenants. As the point was not raised in the lower Court, it cannot now be taken for the first time in second appeal—*Mohima Chunder Roy v. Ram Kishore Acharjee*, 15 Beng. L. R., 142 at 155; *Devji Goyaji v. Godabhai*, 2 Bom. H. C. Rep., 27. The facts found by the Subordinate Judge were not disputed in appeal to the District Court, and consequently the inferences drawn by the lower Courts on those facts cannot now be interfered with.

Candy, J.:—Defendants in this and the companion cases being sued in ejectment set up a right as permanent tenants. The plaintiff, the inamdar, alleged that they were yearly tenants to whom he had given due notice of enhancement of rent. Defendants pleaded that they were not liable to enhancement of rent, and that in any case they could not be made to pay more than the proper and equitable amount as fixed by the Court.

In Suit No. 102, defendants pleaded that field No. 12 had been in their possession for many years, the rent having been raised in 1853 A. D. with their consent from Rs. 16 to 26; that field No. 175 had been leased to them in A. D. 1844 by the then inamdar under a permanent lease, the rent having remained unchanged. Defendants also pleaded that they had spent large sums in improving the fields; and the enhancement of rent claimed by the plaintiff was excessive.

The Subordinate Judge found in Suit No. 102 that neither of the fields (Nos. 12, 175) was *mirasi*, and that the lease of No. 175 was certainly not a permanent lease; that both fields appear to have been taken up by defendants when they were mere waste land, and turned into good cultivable land by them. He expressed no opinion as to the amount said to have been expended on improvements. His chief ground for holding that there was a limit to the inamdar's power of enhancement was that the defendants' holdings were *khata* holdings, as distinguished from *sheri* lands, i.e., lands in which tenant-rights have lapsed, and which are cultivated by the inamdar by his farm servants. The Subordinate Judge took it to be "a notorious fact" that there [480] is such a division of the lands of an inam village, and that the holders of *khata* lands possess and exercise the rights of mortgaging, transferring, and alienating their lands to other people, their holdings being hereditary, and the inamdar never challenging or interfering with those rights. On the above grounds the Subordinate Judge held that the plaintiff could not enhance at his pleasure, but might demand a reasonable rent. The question whether the present enhancement was reasonable, and if not what is the proper amount, he left to be determined at execution.

Plaintiff appealed to the District Judge on the grounds, *inter alia*, that the distinction drawn between *sheri* lands and *khata* holdings was wrong, and that the Subordinate Judge had based his judgment on materials not supplied by the evidence. The District Judge held that the 2nd clause of section 83 of the Land Revenue Code (Act V of 1879, Bombay), did not apply, "that is to say, it cannot be presumed in the absence of evidence that defendants' tenancy is a permanent one, because there is evidence in this case as to its commencement." The District Judge did not give any distinct finding as to whether the defendants were *mirasdars* (defendants apparently accepting the finding of the Subordinate Judge in the negative on that point, as also the finding that the lease of No. 175 was not a permanent lease), nor whether they had taken up the lands when waste and brought the same under cultivation, nor as to what sums (if any) had been spent on improvements; but (he went on to say) "as the Subordinate Judge remarks, there is a well-known distinction between the *sheri* or private lands of an inamdar and the *khata* or *rayatwar* lands held by recognized rayats. If we find that the rayats in an inam village have been cultivating the same lands for generations at a practically uniform rate, that the lands are heritable and transferable, that on the death of a tenant a *varsa* or heirship enquiry is held (as in Government villages) and the name of the heir invariably entered; if the holdings are the subjects of sale and mortgage without let or hindrance on the part of the inamdar; if instances of arbitrary eviction or enhancement are unknown; if the tenants' names are recorded as *khatedars* as in Government villages; if the lands were taken up in order to bring them into a state of cultivation; if the tenants [481] have spent capital and labour on improvements,—it may generally speaking be inferred that the tenants of such lands are not mere tenants at will or even yearly tenants, but that they enjoy a virtual tenant right and that they have a permanent interest in their holdings subject to the payment of rent. This

interest is in accordance with the ancient customs of the country, and it may be also said to rest on an implied contract. From the facts recorded in the lower Court's judgment it would appear that the tenants, who are the defendants in this and in the companion suits, belong to the class of tenants described above, and there does not seem to be any real dispute about this point, though the evidence does not appear to have been specially directed to elucidate it."

It has been contended before us that as the District Judge has found as a fact that the defendants are permanent tenants bound to pay a reasonable rent; this Court is bound by that finding. This might be so, if the finding were based on evidence. In the present case it is admitted that "the facts recorded" by the Subordinate Judge regarding *sheri* and *khata* lands generally are not based on any evidence. He regarded the division between *sheri* and *khata* lands and the rights exercised by the holders of the latter as *notorious*. Plaintiff disputed and still disputes that notoriety. But it was argued before us for the respondent-defendants, that in the appeal in the District Court there was no real dispute,—in fact, it was admitted that there was a well-known distinction between *sheri* and *khata* lands, and that the holders of the latter exercised the rights described by the District Judge, which exercise is good evidence of fixity of tenure at a reasonable rent. No doubt, if the appeal was conducted in the District Court as if all the facts recorded by the Subordinate Judge were admitted, the plaintiff cannot in second appeal question those facts. But the language used by the District Judge will not bear this construction. No doubt the plaintiff or his pleader may have admitted that the defendants did belong to the class of tenants described generally as *khata* tenants; but it would be difficult, in the face of the grounds of appeal as recorded by the District Judge, to hold that it was admitted that the distinction drawn between *sheri* and *khata* [482] tenants was correct, or that every *khata* tenant, as such, exercises the rights described by the Subordinate Judge. There may not to the District Judge have seemed to be any real dispute as to the inclusion of defendants in the class of tenants described as *khata* tenants, but that can hardly be taken as an admission that all the details of the description are correct. Whatever may have been the "point," to the elucidation of which (the District Judge says) the evidence did not appear to have been specially directed, it can hardly have been the exercise by *khata* tenants generally of certain rights, for it is admitted before us that there was no evidence at all on this point. Under these circumstances it is clear that the decision of the District Judge must be taken as based neither on evidence nor admission, and, therefore, not binding in second appeal; and the case must accordingly be remanded for proper enquiry.

It may be remarked that the distinction drawn by the District Judge between *sheri* and *khata* lands, and the rights and privileges assigned by him to the latter, were intended by him to apply solely to those *khata* tenancies in which there is no express contract between landlord and tenant. Under section 85 of the Land Revenue Code (Bombay Act V of 1879), it is incumbent on every superior holder of an alienated village in which there exists an hereditary patel and village accountant to receive his dues on account of rent or land revenue from the inferior holders through the said village officers. By section 3 'inferior holder' signifies a holder liable to pay the rent or land revenue to a superior holder, and 'tenant' signifies a person who holds by a right derived from a superior holder called his landlord. Thus a tenant is an inferior holder, whose superior holder is his landlord. Now it is easy to conceive a case of land of which tenant-rights have lapsed to the inamdar, but

which he does not wish to cultivate by his farm servants ; accordingly he leases it, say, on a lease for five years to a tenant, with power of re-entry at the expiration of the term. It would be absurd to say that this tenant is a permanent tenant whose rent could never be enhanced beyond a reasonable rate. And yet the land would be "*khata* or *ryatwar* land held by a recognized tenant;" "the tenant's name is recorded as *khatedar* as in Government villages"; it is [483] a "registered tenancy"; the landlord is prohibited from collecting the rent otherwise than through the village officers. In the same way the landlord may, by a permanent lease, have expressly bound himself never to enhance the rent. Therefore when it is said that the holders of *khata* lands as such have rights of alienation, transfer and inheritance, the reference must be solely to those *khata* tenants who do not hold under express contracts. There is nothing to show that in the village in which are situated the lands now in dispute, there are any *sheri* lands properly so called. All the lands may be *khata* holdings. The plaintiff inamdar deposed in Suit No. 383 that there were no *sheri* lands. It is possible that the tenants of some of these lands, though they are not mirasdars, have by local usage in virtue of their length of possession and uniformity of payment of rent or otherwise acquired a right to hold in perpetuity their lands on payment of rent ascertainable by local usage. The District Judge in the cases now before the Court has not arrived at any specific finding as to how many years the defendants and their predecessors in title have held their lands, and as to whether any of the lands were taken up when more waste, and brought under cultivation at great expense. These are important elements in the consideration of the question whether there is any limit to the landlord's right of enhancement. It is not enough to say "if the lands were taken up, &c.," "if the tenants have spent capital, &c.," and "it would appear to be admitted that defendants did take up the lands and dispend capital." Clear definite admissions or findings are required on important allegations made by defendants in support of their pleas. The Subordinate Judge held that there had been enhancement in respect to some of these lands ; so a clearer finding by the District Court is necessary than the general statement "if we find that the rayats in an inam village have been cultivating the same lands for generations at a practically uniform rate, &c."

Then comes the important question whether *khata* tenants who hold under no express contract reserving or limiting the right of the landlord, have possessed and exercised the rights of mortgaging, transferring and alienating their lands to other people, the holdings being hereditary, and the inamdar never [484] challenging those rights or interfering with their exercise. The best evidence, no doubt, if procurable, would be evidence of custom in this particular village ; but evidence as to similar tenants in similar villages must not be excluded. As was said in *Prataprao Gujar v. Bayaji*, I. L. R., 3 Bom., 141 at p. 144, does the tenure by which the lands are held impose, according to the customary law of the district, any and what limits upon the power of a grantee from the Government in inam to enhance the rent or assessment payable on account of the said lands? In *Baba v. Vishvanath*, I. L. R., 8 Bom., 223, the plaintiff was the same plaintiff as in the present cases ; but the defendant pleaded that he was not bound ever to pay anything beyond the fixed rent of Rs. 11. He did not plead (as here) that he was willing to pay a reasonable rent, and the important question of local usage was not raised.

We may remark here that we do not agree with the Subordinate Judge that, if the lands were leased to the tenants at a time before the inamdar had accepted the provisions of the summary settlement, the tenants must necessarily be presumed to have entered on their tenancy under a belief that should the

inam lapse to Government, their rent would not be enhanced beyond a reasonable rate, and, therefore, the present inamdar is bound to give effect to that understanding. The defendants raised no such plea, nor apparently was it accepted by the District Judge. Nor do we agree with the Subordinate Judge that mirasdars in an inam village can always claim to hold at a fixed rent. As stated in *Lakshman v. Ganpatrav*, I. L. R., 3 Bom., 145, note, an inamdar can enhance the rents of mirasdars within the limits of custom. In the present cases the tenants, though found not to be mirasdars, claim the same right.

Lastly, it must be noted that in these cases a distinct issue was raised as to what should be the limit of the rent, if the inamdar's power of enhancement is limited. We do not think that this should be left to be determined in execution proceedings. As the cases must go down, we think that the question should be decided in the trial, if the inamdar's right of enhancement is found to be limited.

[485] In order that the various questions above indicated may be duly investigated, we reverse the decree of the District Judge and remand the case for a further investigation with reference to the above remarks, with power to take such fresh evidence as may be necessary and legally admissible. Costs throughout should be disposed of on the further trial in such manner as may be just.

Decree reversed and case remanded.

NOTES.

[As regards fixity of rent, see also (1899) 1 Bom. L. R., 373 ; (1903) 5 Bom. L. R., 186.]

[17 Bom. 485]

APPELLATE CRIMINAL.

The 3rd August, 1892.

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Queen-Empress

versus

Bhima.*

Evidence Act (I of 1872), Secs. 25 and 26—Confession—Confession made to a police patel, admissibility of—Evidence—Police officer.

A police patel is a police officer within the meaning of section 25 and 26 of the Indian Evidence Act (I of 1872). A confession made to a police patel is inadmissible in evidence.

APPEAL against the conviction and sentences passed by Rao Saheb Venkatrao R. Inamdar, Joint Sessions Judge of Bijapur, in the case of *Queen-Empress v. Bhima bin Hanmapa*.

The accused was charged under section 457 of the Indian Penal Code with house-breaking by night with intent to commit rape, and under section 354 with assaulting the complainant with intent to outrage her modesty.

At the trial the prosecution tendered in evidence a confession made by the accused to the police patel in the presence of the *panch*.

The Sessions Judge admitted this confession on the ground that the police patel was not a police officer within the meaning of sections 25 and 26 of the Indian Evidence Act.

On this confession as well as on other evidence in the case the accused was convicted under sections 457 and 354 of the Indian Penal Code respectively, and sentenced to rigorous imprisonment for one year for the first offence, and for six months for the second.

[486] Against this conviction and sentences the accused appealed to the High Court.

There was no appearance for the Crown, or for the Accused.

Jardine, J. :—The Joint Sessions Judge admitted evidence of a confession made by the prisoner to a police patel, holding that a police patel is not a police officer within the meaning of sections 25 and 26 of the Indian Evidence Act. He thought this novel view of the law is supported by the cases of *Queen-Empress v. Kama Papi*, I. L. R., 7 Mad., 287, and *The Empress v. Ramanjiyya*, I. L. R., 2 Mad., 5, on village Munsifs in the Presidency of Madras. But these cases are decided on the view that those Munsifs are Magistrates and not police officers, which cannot be said of police patels in this Presidency. *Vide* the Bombay Village Police Act, 1867. We follow *Queen v. Horrible Chunder Ghose*, I. L. R., 1 Cal., 207, in which it was held that the term "police officer" in these sections should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, and we are of opinion that the evidence of the confession was inadmissible. But as the conviction can be sustained on the remaining evidence, we dismiss the appeal.

Appeal dismissed.

NOTES.

[A village chowkidar was not treated as a police officer in (1897) 2 C. W. N., 71.]

[17 Bom. 486]

APPELLATE CIVIL.

The 11th August, 1892.

PRESENT :

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

c Bhaskar Purshotam and others.....(Original Plaintiffs) Appellants

versus

Sarasvatibai.....(Original Defendant) Respondent.

' Hindu law '—Verbal gift of immoveable property—Death of the donor—Possession given to the donee by the son of the donor.

One Ganesh Vithal, being possessed of certain lands which were his self-acquired property, died in 1878. On his death-bed he told his son, Purshotam Ganesh, (the plaintiff's father), to give these lands to his (Ganesh Vithal's) daughter, the defendant. In the following year (1879) Purshotam by a registered deed of gift gave the lands to the defendant. The deed contained the following recital :—"Our vadir (father) Ganesh Vithal has made a gift to you of his self-acquired lands Nos. 101 and 102 of Mauze Vadgaon for your own and your

* Second Appeal, No. 337 of 1891.

[487] children's maintenance, and has directed me (Purshotam Ganesh) to execute an instrument according to law. I (Purshotam Ganesh) hereby execute a deed of gift to you." Shortly after the execution of this document, the defendant was put into possession of the lands, and she admittedly continued in possession down to the commencement of this suit in 1888. The plaintiffs, who were the minor children of Purshotam Ganesh, now sought to recover these lands from the defendant, alleging that on the death of their grandfather, Ganesh Vithal, the lands had devolved by inheritance upon his son Purshotam (their father), and contending that the latter had no power to make a gift of them to the defendant. The lower Court found that the question of Purshotam's competency to give the lands did not arise, as they had already been given to the defendant by his father, Ganesh Vithal, and that Purshotam was simply an instrument in carrying out the wishes of his father, and in executing the deed of gift to the defendant. On appeal, the District Judge considered that the point for determination was whether the gift by Ganesh Vithal to the defendant was valid by Hindu law, not having been accompanied by possession. He held the gift to be valid. On special appeal to the High Court,

Held, dismissing the appeal, that whether the gift by Ganesh Vithal to the defendant was to be regarded as a gift, possession being afterwards given to the defendant, or whether Ganesh Vithal was to be regarded as having constituted himself a trustee and having made Purshotam a trustee to carry out his wishes, the defendant was in lawful possession of the lands, and that the plaintiffs had neither by Hindu law nor otherwise, any legal or equitable claim to have the deed of gift to the defendant cancelled.

SECOND APPEAL from the decision of T. Hart-Davies, Acting District Judge of Poona.

Suit to recover land and to set aside an alleged gift. The plaintiffs alleged that the lands in question were the self-acquired property of their grandfather Ganesh Vithal Gharpure, and that after his death his son (the plaintiffs' father), on whom the lands devolved by right of succession and inheritance, made a gift of them to his sister, the defendant, under a registered instrument of gift. The plaintiffs contended that the property being ancestral in the hands of their father, he had no authority to make a gift of it under the Hindu law; they, therefore, sought to set aside the gift and to recover possession of the property from the defendant.

The defendant contended that the gift to her was a valid gift. She stated that owing to her father's death he had not delivered possession of the land, but that after his death she had been put into possession by his (the donor's) son.

[488] The Subordinate Judge held that though the gift to the defendant was not accompanied with the delivery of possession at the time it was made, nevertheless as possession was subsequently delivered, the gift was valid under Hindu law. He rejected the plaintiffs' claim.

The plaintiffs appealed, and the decree being confirmed by the District Judge the plaintiffs then preferred this second appeal.

(Facts in addition to those stated above appear in the judgment.)

Purushottam Parashuram Khare, for the Appellants (Plaintiffs):—Delivery of possession by a donor and the acceptance by the donee are essential to constitute a valid gift under the Hindu law—*Vasudev v. Narayan*, 1. L. R., 7 Bom., 131; *Harjivan Anandram v. Naran Haribhai*, 4 Bom. H. C. Rep., A. C. J., 31; *Lalubhai Surchand v. Bai Amrit*, 1. L. R., 2 Bom. 299; Mayno's Hindu Law, paras. 351, 352. In this case the donor Ganesh did not deliver possession. The gift is, therefore, invalid. Moreover, on the death of Ganesh the lands in question devolved on his son (the plaintiffs' father) and were ancestral property in his hands. He could not, therefore, alienate it by way of gift to his sister (the defendant).

The case of *Kali Das v. Kanhyt Lal*, L. R., 11 I. A., 218; I. L. R., 11 Cal., 121, is distinguishable. There the object of the gift was not in the possession of the donor and the dispute was between the donor and a stranger. But in this case the donor Ganesh was in possession of the property and could have given possession to the donee. Further, the dispute here is between the donor's representatives and the donee. Ganesh no doubt directed his son Purshotam to execute a deed of gift. Purshotam, however, could not legally do so, for as soon as the property came to him, it became ancestral in his hands. Ganesh died without effectually completing the gift, and the subsequent delivery of possession by Purshotam could not validate his father's incomplete gift.

Vishnu Krishna Bhatavdekar, for the Respondent:—We rely on the case of *Kali Das v. Kanhya Lal*, L. R., 11 I. A., 218; I. L. R., 11 Cal., 121. At the time of making the gift the donor was on his death-bed at Poona and the pro-[489] perty was 30 miles distant from that place. Under the circumstances the donor did all in his power to complete the gift. By directing Purshotam to execute a deed of gift to the defendant, Ganesh made him a trustee for her. Purshotam carried out the trust, and after his father's death he was in possession of the property on behalf of the donee and not as his father's heir. The following cases were cited:—*Meherali v. Tajudin*, I. L. R., 13 Bom., 156; *Dharmodas v. Nistarini Das*, I. L. R., 14 Cal. 446, *Mahomed Bulsh Khan v. Hosseini Bibi*, I. L. R., 15 Cal., 684.

Cur. adv. vult.

11th August 1892. **Bayley, C. J.** (Acting):—This suit was instituted by the plaintiffs, who are minors, through their mother and next friend Luxmibai against the defendant, who is sister of the plaintiffs' father, Purshotam Ganesh, to recover possession of two pieces of land, measuring, respectively, 21 acres 16 gunthas and 25 acres 36 gunthas, at Vadgaon, in the Maval Taluka of the district of Poona, which they state in their plaint was the self-acquired property of their grandfather Ganesh Vithal, and which on his death devolved upon their father Purshotam in right of succession and inheritance, and of which he made a gift to his sister, the defendant, under a registered instrument of gift, which by Hindu law he was incompetent to do. They pray for a declaration that their father had no authority to transfer the land in dispute by deed of gift, and for a cancellation of the deed, and for recovery of possession of the property in dispute. They also ask for mesne profits and the costs of the suit.

The defendant by her written statement said that the lands in dispute, which were the self-acquired property of Ganesh Vithal, were given to her as a gift; that plaintiffs' father with the consent of their mother setting aside Ganesh's act and receiving Rs. 1,800 got the defendant to have the instrument executed in her favour in the form of a deed of gift; that the reason of the instrument being executed in that form was that there were disputes going on between defendant and her husband in regard to her maintenance, and that, in order, that the amount of her *stridhan* might be secured, she paid a part of the amount [490] of her *stridhan* and got the instrument executed, which was not really a deed of gift, though the plaintiffs have described it to be so, and that, in the event of its being decided that the present suit will lie, the plaintiffs are not entitled to possession of the lands unless the sum of Rs. 1,800 and the costs of suit are paid.

Amongst other issues the following were framed by the Subordinate Judge:—

4. Whether the minor plaintiffs' father had authority to make the alleged gift, and whether the lands, the subject of the alleged gift, were the

self-acquired property or the ancestral property of the plaintiffs' grandfather, and whether he had made a gift of the same?

5. Whether the alleged deed of gift is proved?

The Subordinate Judge found on the 4th issue that the lands, the subject of the gift, were the self-acquired property of the plaintiffs' grandfather, who had made a gift of the same; on the 5th issue he found that the deed of gift was proved, and rejected the plaintiffs' claim with costs.

The plaintiffs appealed on the grounds that it was wrong to hold that the grandfather had made a gift of the lands; that the gift, if made, was not legal, as it was not accompanied by possession; and that the evidence was wrongly weighed.

The District Judge considered that the point for determination appeared to be, was the lower Court correct in holding that the gift by the grandfather, which was without possession, was valid under Hindu law? No further issue was suggested.

The District Judge held that the actual delivery and acceptance was made after Ganesh's death, so that it was doubtful whether his gift was a valid one or not; that on the general principle of Hindu law that a father's promises are looked upon as binding, and that his dying directions should be obeyed, this gift by his son must be held to be valid. He was inclined to think that the rule that possession must be given during the donor's lifetime is not of universally binding application, and that if the gift is sufficiently proved in other ways it would be valid. Accordingly he thought that the gift by the grandfather [491] was valid, and as to the fact of the gift, there was, he thought, no doubt on the evidence which was believed by the Subordinate Judge, supported as it was by the recital in the deed of gift by the grandfather's son Purshotam. He did not think that the transaction as to Rs. 1,800 rendered the gift by the grandfather invalid, and he dismissed the appeal with costs. The plaintiffs specially appealed to the High Court, and on the argument before us it was contended on their behalf that the gift by Ganesh Vithal not having been accompanied by possession must fail.

The lower Courts have found that the plaintiffs' grandfather (Ganesh Vithal) on his death-bed told his son Purshotam (the plaintiffs' father) to give the lands in dispute to the defendant (daughter of Ganesh and sister of Purshotam). Ganesh died a few days afterwards in 1878. Purshotam in 1879 by registered deed of gift, as to the execution of which there was no dispute, gave the property to defendant. The deed contained this recital: "Our vadir (father) Ganesh Vithal has made a gift to you of his self-acquired lands Nos. 101 and 102 of maujo Vadgaon for your own and your children's maintenance, and has directed me (Purshotam Ganesh) to execute an instrument according to law. I (Purshotam Ganesh) hereby execute a deed of gift to you."

The Subordinate Judge states that Purshotam in his evidence alleged that the deed of gift was executed by him without any direction from his father so to do; but the Subordinate Judge has held that such allegation was false, as besides the recital in the deed of gift above quoted, the plaintiffs' witness No. 15, Hari Dhonddev, the writer of it, deposed that he wrote the words "that the lands were given to defendant by defendant's father" at the instance of defendant, and that Purshotam gave his assent to the insertion of those words. The writer also stated (says the Subordinate Judge) that the clause restricting the alienation of the lands was inserted in the deed of gift at the instance of Purshotam. The Subordinate Judge said that defendant's witnesses, Hari Ganesh Joshi, maternal uncle of defendant and Purshotam,

Hari bin Govinda, tenant of the lands in dispute, and Doorgabai, who lived in defendant's house and [492] who said she used to go and see Ganesh Vithal during his last illness, all deposed that Ganesh Vithal made a gift of the lands to his daughter, and that he did not see any reason for disbelieving such witnesses on this point, especially because they fully corroborated the recital in the deed of gift that the lands had been given to defendant by her father Ganesh Vithal.

The District Judge, as to the fact of the gift by Ganesh Vithal, concurred in the view of the evidence taken on that point by the Subordinate Judge.

The Subordinate Judge towards the conclusion of his judgment said, and we think correctly said, that the question of the competency or otherwise of Purshotam in making a gift of the lands to defendant did not arise, since they were already given by Ganesh Vithal, and Purshotam was simply an instrument in carrying out the wishes of his father and in executing the deed of gift to defendant accordingly.

The Subordinate Judge found that it was proved by Purshotam that on or shortly after the execution of the deed of gift in 1879 defendant was put into possession of the lands in dispute, and that she admittedly continued in possession down to the commencement of this suit in 1888, a period of nine years.

The Transfer of Property Act (No. IV of 1882) is not yet in force in the Bombay Presidency, and the fact that the gift by Ganesh Vithal was a verbal one is no objection to its validity, if such gift was in other respects in accordance with Hindu law. In *Balaram v. Appa*, 9 Bom. II. C. Rep. 121, Sir M. WESTROPP, C. J., in delivering the judgment of the Court says: "We must recollect that by the law of Hindus, who constitute the great majority of the population and landholders of this country, a deed or writing is not necessary to effect the transfer of land. That transfer may be fully effected by verbal contract or gift, if accompanied by possession—6 Moore's I. A., 267; 1 Mad. H. C. Rep., 100." Is, then, the circumstance that in the present case the defendant was not put into possession of the lands in dispute during her father's lifetime, but only in the year after his death, fatal to her right to retain them as against the plaintiffs? There are [493] decisions in this Court that according to Hindu law, in order to give complete validity to a gift of land as between donor and donee, the donee must be put into possession. It will be sufficient to quote a recent decision in 1882 on this point. In *Vasudev v. Narayan*, I. L. R. 7 Bom. 131, at pp. 132-33, Sir CHARLES SARGENT, C. J., says: "We think the language of the texts set out *in extenso* in *Hargovan v. Narran*, 4 Bom. H. C. Rep. (A. C. J.), 31, and at pages 327 and 328 of Mr. Justice WEST's judgment, I. L. R., 2 Bom., is too clear and express in requiring delivery and acceptance of the subject of the gift to be effected in the case of land by putting the donee into possession in order to give complete validity to a gift as between donor and donee, and their authority in their literal terms has been too frequently and too long recognized by judicial decisions to allow of that ceremony (in some form or other) being dispensed with otherwise than by legislative enactment." The case of *Dharmodas Das v. Nistarini Das*, I. L. R., 14 Cal., 446, which came before the High Court at Calcutta in 1887, was decided on section 123 of the Transfer of Property Act, IV of 1882. There a man shortly before his death had in 1883 executed a deed of gift of certain land in favour of his daughter, but it was not shown that possession of the property was delivered to her during her father's lifetime. In a suit by the daughter to recover possession, the District Judge, upholding the decision of the Munsif, held that section 123 of the Act was

applicable to Hindus, and that delivery of possession was no longer, if it ever was, necessary to make valid a gift of immoveable property among Hindus. The High Court, consisting of MITTER and BEVERLEY, JJ., supported the view taken by the District Judge and said (p. 488): "We may, however, state here that it is by no means clear under the Hindu law that, to make a gift of immoveable property valid and complete, delivery of possession is essentially necessary. What is laid down in the Hindu law is this, that to constitute a valid gift there must be acceptance by the donee, and one of the modes of acceptance in gifts of immoveable property is delivery of possession on the part of the donor and receipt of possession by the donee." In *Maharajah Moheshwar Buksh Singh v. Mussamut* [494] *Gunoon Koonwar*, 6 C. W. R., 245 Civ. Rul., decided by KEMF and MARKBY, JJ., in 1866, it was held that the absence of seisin is no objection to the validity of a gift by a Hindu.

Mr. Mayne in his valuable Treatise on Hindu law, section 351, says that few propositions have been laid down with more confidence than the doctrine that under Hindu law a gift is invalid without possession. Yet Hindu law properly so called, appears to lay little stress on any such rule as specially applicable to gifts. Gifts, he says, have always been favoured by the Brahmin lawyers, for the obvious reason that they were generally made to Brahmins. The early sages, says Mr. Mayne, discuss the Law of Gifts with special reference to their liability to resumption. That depends on the purpose of the gift or the special circumstances of the giver, and he then proceeds to quote the various dicta of the sages on the point.

During the argument before us, Mr. Khare, pleader for the plaintiffs, called our attention to the evidence of Hari bin Govinda, the tenant of the lands in dispute, who had been present when Ganesh Vithal had made the gift to the defendant, a witness whose statement the lower Courts saw no reason to disbelieve, who stated in cross-examination that Ganesh Vithal said that he bought the property to give to his daughter, that if he recovered he would execute a document to her, if not "you (Purshotam) and my own wife are to execute a deed in favour of the daughter." Clearly, therefore, Ganesh Vithal had no intention of resuming his gift. Mr. Mayne in section 351 quotes Harita as laying it down broadly that "a promise legally made in words, but not performed in deed, is a debt of conscience both in this world and the next." That text is given in Colebrooke's Digest, Vol. I, p. 447. At page 414 of that Digest another text of Harita is quoted: "He who gives not what he has promised, and he who takes back what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animal."

It is stated by the District Judge that the gift was made by Ganesh Vithal when on his death-bed. His daughter, we were [495] told, was living with him at that time, and the District Judge stated that the lands in question, the object of the gift, were about 30 miles distant from the residence of the donor and donee.

A *donatio mortis causa* of moveable property is recognized in Hindu law—1 West and Buhler, 219, (3rd Ed.). At Vol. II of that work, p. 747, [Note (a)], it is stated that "a father's promises are looked on as binding, unless the performance of them would prevent the fulfilment of some still more sacred duty. But that the Courts will not enforce such obligations except subject to the conditions of the Statute law where that is in force."

In 1878, when this gift was made, there was not, nor is there yet in the Mofussil of this Presidency any legislative enactment applicable to a gift such as the one now in question. We may here notice the case of *Kumara Upendra v. Nabin Krishna Bose*, 3 Beng. L. R., O. C. J., 113. There a Hindu, when on

his death-bed, caused certain Government papers for the sum of Rs. 30,500 to be given to his son in his presence, saying: "Bring out the papers and give them to my son," but he did not make or direct any endorsement thereof. Subsequently being asked to endorse them he said: "I am very weak, how can I sign so many papers: when I get a little strength I will sign them, what cause have you for being anxious." PHEAR, J., decided that it was a good *donatio mortis causa*, which had not the same signification in India as in England. The decree was affirmed on appeal, Sir BARNES PEACOCK, C. J., holding that the gift was not governed by the strict principles of English law, but by the Hindu law. That by English law there was a valid *donatio mortis causa*, but assuming it to be a gift *inter vivos* it was a valid gift by Hindu law. Sir BARNES PEACOCK said (p. 122): "If the gift were to be governed by the English law, and treated as a voluntary gift without condition, and not as a *donatio mortis causa*, I think the relation of trustee and *cestui que* trust was created between the donor and the donee." See, too, his remarks at p. 123, to the effect that the donor, if he had lived, or his representatives after his death, could not at law have compelled the donee to have returned the Government papers.

[496] We think it cannot be denied that the decisions in this Court as to the necessity for a donee to be put into possession in order to give complete validity to a gift of land according to Hindu law have been more or less affected by the case of *Kali Das Mullick v. Kanhya Lal Pundit*, L. R., 11 I. A., 218, decided by the Judicial Committee of the Privy Council in 1884. Three of the Bombay decisions reported in 4 Bom. H. C. Rep., A. C. J., 31, 7 Bom. H. C. Rep., A. C. J., 4; 10 Bom. H. C. Rep., 491, were criticised and explained in the judgment in that case. It was strenuously argued before the Judicial Committee by Mr. Doyne and Mr. Mayne that the deed of gift, which was the basis of the plaintiff's title, was wholly invalid, as the donor was out of possession at the time, and no possession was ever given to the donee, and that a gift by a Hindu is invalid, without delivery of possession and acceptance. Their Lordships, however, held that by Hindu law a gift of property, whether moveable or immoveable, may operate, where no question of resumption arises; to give to the donee a right to obtain possession, and is not invalid by reason of its not being immediately followed by possession; and, therefore, that where a donor had done all she could to complete the gift, was a party to the suit to set it aside brought by a plaintiff claiming adversely to both parties thereto, and admitted the gift to be complete, it was held that such a gift could not be set aside as utterly invalid because the donor was out of possession, and no possession was ever given to the donee.

In a case that came before the Judicial Committee of the Privy Council in 1888—*Mahomed Buksh Khan v. Hosseini Bibi*, L. R., 15 I. A., 31; I. L. R., 15 Cal., 684—where the question was, whether a gift, assuming one to have been made, was good by Mahomedan law, their Lordships say (p. 95): "The other point was, that the gift was invalid because possession was not given. That subject was considered in a case which came before this Board in 1884—*Kali Das Mullick v. Kanhya Lal Pundit*, L. R., 11 I. A., 218. There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers, [497] where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the *shibbanama* itself authorizes the donees to take

possession, and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that *Shahzadi* had not possession, and that she herself did not give possession at the time."

The question as to the right of the defendant in the present case to retain, as against the plaintiffs, the lands, possession of which in fulfilment of his father's directions was given to her by her brother Purshotam in 1879, the year following that in which Ganesh Vithal died, may, we think, be regarded from another point of view. The Subordinate Judge, it will be remembered, considered that the plaintiffs' father Purshotam was simply an instrument in carrying out the wishes of his deceased father Ganesh Vithal.

During the argument of the appeal before us, the Court asked the learned pleaders whether Ganesh Vithal might not be taken to have constituted Purshotam a trustee to carry out his (Ganesh's) intention? As pointed out to us by the pleader for the plaintiffs, Hari bin Govinda, the tenant of the lands in dispute, whose evidence was considered trustworthy by both the lower Courts, had stated that Ganesh Vithal, after saying that if he recovered he would execute a document, added, but if not, Purshotam and his own wife were to execute a deed in favour of the defendant.

The difficulty which arose in some of the transactions, which in previous cases became the subject of judicial decision, owing to their incomplete or imperfect character, does not arise here where everything that was intended by Ganesh Vithal to be done has been done. In the year after his father's death, Purshotam carried out his father's instruction, thus far, *viz.*, he executed the document to the defendant, and she was put in possession of the property: Whether in framing that document Pur-[498]shotam had any power to insert in it the clause prohibiting the defendant from mortgaging, selling or otherwise alienating the lands to any one else, a clause which the Subordinate Judge says Purshotam admits was written by him of his own will and was not inserted at the instance of the defendant, need not now be considered. It is clear that Purshotam executed the document for the purpose of carrying out his father's wishes. It became necessary for him to execute such deed of gift, since owing to his death his father had been unable to execute a formal deed of gift in his lifetime, and which, had he recovered, he intended to have done.

It must be borne in mind that the gift and directions regarding it by Ganesh Vithal were, as found by the Lower Appellate Court, made and given when he was on his death-bed.

The case of *Duffield v. Elwes*, 1 Bligh., N. S., 497, (decided by the House of Lords), where a mortgage was held a good subject of *donatio mortis causa*, shows that there may in England be a good *donatio mortis causa* of an instrument which does not pass by delivery, and that the executors of the donor are trustees for the donee for the purpose of giving effect to the gift. In *In re Dillon*, 44 Ch. Div., 76, which came before the Court of Appeal in 1890, where it was held that a banker's deposit note was a good subject of a *donatio mortis causa*, COTTON, L. J., and LINDLEY, L. J., in commenting on *Duffield v. Elwes* say that in the case of an incomplete voluntary gift *inter vivos* the Court would not interfere to compel either the donor or his executors to perfect it, but that the House of Lords in *Duffield v. Elwes* held, and it was established by that decision, that the principle of not assisting a volunteer to perfect an incomplete gift does not apply to a *donatio mortis causa*.

In *In re Richards*, 36 Ch. Div., 541, decided by Mr. Justice NORTH in 1887, a testatrix by her will, made in 1873, bequeathed a legacy of £150 to her

servant, Ellen Harris. In 1877 she handed to Cottrell, her solicitor, a promissory note for £200 signed by herself and payable on demand to Ellen Harris, telling Cottrell not to mention the note to any one but Ellen Harris, but on the [499] death of the testatrix to give it to Ellen Harris if she should remain in the service of the testatrix until her death. The testatrix died in 1881 and had never revoked the direction which she had given to Cottrell about the note. It was held that Cottrell was constituted a trustee of the note that he might after the death of the testatrix hand it over to Ellen Harris, if she fulfilled the prescribed condition, and that Ellen Harris was entitled to prove for the amount of the note in the administration of the estate of the testatrix. It was argued on behalf of Ellen Harris that there was a complete gift of the note to her or a declaration of trust of it in her favour, subject only to the condition that she should remain in the service of the testatrix until the death of the latter, and that such condition was fulfilled. On the other side it was contended that the gift of the note was voluntary and was incomplete; it was only intended to be made, not actually made, and that the Court will not aid in perfecting an imperfect voluntary gift. NORTH, J., said (p. 541): "It is sufficient if there was either a complete transfer of the property in the note, or a declaration of trust of it. The testatrix might have made a declaration of trust making herself trustee. It was equally competent to her to make a third person a trustee for the purpose. It appears to me that the note was handed to Mr. Cottrell for the purpose and with the intention expressed by the testatrix at the time when it was given, which intention was never altered down to the time of her death, and that enough was done to constitute him a trustee of the note for Mrs. Brock (i.e., Ellen Harris) in case she should fulfil the prescribed condition.... It appears to me that the note was placed by the testatrix in his hands as a trustee in order that he might hand it over to Mrs. Brock upon the happening of the particular event mentioned by the testatrix. It is not necessary to consider what the power of the testatrix might have been in the meantime, if she had changed her mind because she did not do so."

The question whether a person who purchased a Government Promissory Note of the nominal value of Rs. 5,000 in his own name had constituted himself a trustee of it for his daughter, arose in the case of *Hirbai v. Jan Mahomed Khalak-dina*, I. L. R., 7 Bom., 229, which [500] came before Mr. Justice WEST, and afterwards before the Court of Appeal consisting of Sir CHARLES SARGENT, C.J., and BAYLEY, J. Both Courts held that the alleged trust was not established by the evidence, and the suit by Hirbai, the daughter, was dismissed, but without costs, the father's intention that his daughter should have the benefit of the Rs. 5,000, to which, however, he failed to give effect, being clear. The law on such subject was very clearly stated by Sir CHARLES SARGENT, C.J., in delivering the judgment of the Court of Appeal. He said (p. 250): "Now the plaintiff's case is that, although there was no complete transfer of the legal ownership in the note, Khalphanbhoy constituted himself a trustee of the note for the benefit of Hirbai, and that the Court will enforce the trust, although a voluntary, one. A long series of authorities in the Courts of Equity in England have established that, although the Court will not assist an incomplete gift, it will give effect to a declaration of trust by the donor when clearly and satisfactorily established. The application of this doctrine to particular cases has, doubtless, given rise to much divergence of opinion; but we think that, having regard to the weight of authority, the law may now be taken to be as stated by Sir G. JESSEL in *Richards v. Delbridge*, L. R., 18 Eq., at p. 14. "The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount

in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to [501] carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."

At page 251 the Chief Justice says: "The equitable doctrine of the transfer of ownership by acknowledgment of trust when it is sought to establish it by oral evidence, requires to be applied in this country with the greatest caution; and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties speaking as to conversations which took place seventeen years ago, without the corroboration derived from other evidence pointing irresistibly in the same direction, would be to introduce a most dangerous mode of appreciating evidence in this country and would offer a direct encouragement to perjury."

In the present case no such difficulty or danger exists. From the oral and documentary evidence produced before the Subordinate Judge, both he and the Judge of the Lower Appellate Court have arrived at the clear conclusion that the lands in question were given by Ganesh Vithal to the defendant, and that as his death a day or two afterwards prevented his carrying out his intention of executing a formal instrument of gift, his son Purshotam executed the deed of gift in obedience to and for the purposes of carrying out the wishes of his father, and possession of the lands mentioned in it was, therefore, given to the defendant. We think that Ganesh Vithal, considering the dying condition he was in, must be taken to have done all or nearly all he could to carry out his intention, but at all events that he must be considered as having constituted himself a trustee and also his son Purshotam a trustee to execute a formal deed of gift of the lands in question to the defendant, although by law no formal deed was necessary. Why Purshotam delayed executing the document for several months, does not clearly appear. When it was at length executed, it had as much binding effect as if it had been executed the day after Ganesh Vithal's death. In executing it, Purshotam was carrying out the trust expressly imposed on him by his father. The property was admittedly the self-acquired property of Ganesh Vithal, and he was at perfect liberty to dispose of it as he thought proper.

[502] The plaintiffs in their ninth ground of appeal presented to this Court, object that the lower Court should have construed Exhibit 16 (the deed of gift by Purshotam to defendant) and determined the rights of the parties under it. No arguments were addressed to us as to whether or not the defendant, in the events which have happened, took more than a life-interest in the lands in dispute, nor is it necessary for the determination of this appeal for us to consider the extent of the interest which she now has in the property. We cannot gather from the findings on the issues raised in the lower Courts or from the judgments of the Subordinate Judge or of the District Judge that the quality or extent of the defendant's interest in the lands in dispute was either argued or determined.

Upon the whole case, therefore, we are of opinion, whether the gift of the lands in dispute by Ganesh Vithal be regarded as a gift, possession thereof being afterwards given to and taken by the defendant, Ganesh Vithal having, as

it appears, bought the property to give to his daughter, or whether Ganesh Vithal be considered as having constituted himself a trustee, and as having also made Purshotam a trustee to carry out his wishes, that the defendant ever since 1879 has been and still is in lawful possession of the lands in dispute, and that the plaintiffs have neither by Hindu law nor otherwise any legal or equitable claim to have the deed of gift (Exhibit 16) cancelled or to deprive the defendant of her possession of the property. Consequently the decree of the Lower Appellate Court must be confirmed and the appeal dismissed with costs on the appellants.

Decree confirmed.

NOTES.

[See also (1837) 21 Mad., 10 at 17 ; (1901) P. L. R. , 21.]

[503] APPELLATE CIVIL.

The 15th August, 1892

PRESENT

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR JUSTICE CANDY.

Annaji Dattatraya..... (Original Plaintiff) Appellant

versus

Chandrabai.....(Original Defendant) Respondent.

Civil Procedure Code (Act XIV of 1882), Sec. 266—Attachable interest—

Vested remainder—Gift—Gift to a woman gives a life interest.

The plaintiff sued to have it declared that a certain house was liable to be attached and sold in execution of a decree obtained by him against the defendant's son. The defendant, who was 80 years of age, claimed the house as her absolute property, alleging that her son by a deed had given it to her as a provision for her maintenance. The deed stated that she had been made the owner of the house; that the donor had no right to it, and that it wholly belonged to her.

Held, that the plaintiff was entitled to the declaration prayed for. The surrounding circumstances showed that the house was revertible to the donor on the defendant's death. He had what in English law would be termed a vested remainder on her death, and he had, therefore, a saleable interest during her life. He had an interest which could be attached and sold under section 266 of the Civil Procedure Code (Act XIV of 1882).

In the case of gifts, as in the case of wills, the well-established rule must be followed that, in the absence of express words showing such an intention, a gift to a woman does not confer an absolute estate of inheritance which she is enabled to alienate.

THIS was a second appeal from the decision of Dr. A. D. Pollen, District Judge of Belgaum.

The plaintiff sued for a declaration that a certain house was liable to be attached and sold in execution of a decree obtained by him against the defendant's son, Ravji Raghunath Karnik, in the Bombay Court of Small Causes.

The defendant Chandrabai contended that the house was her absolute property under an assignment from her son Ravji Raghunath for her separate maintenance. The assignment was in the following terms :

" You are my adoptive mother. We lived together till to day, but we cannot live together hereafter. If you live apart I am not likely to provide maintenance for you at the proper

time. Hence as a provision for your support I have delivered my house to you and made you the owner thereof. You should live in the house and let it to others. You may recover its rent direct. I have no [504] right to it. It wholly belongs to you. I have this day delivered possession of the house to you, and caused the tenants to execute *kabuliyats* in your favour. I have not mortgaged or sold the house to others. I have no right to do so in future. You will hereafter have no claim for maintenance against me. You should support yourself by the rent of the house. I have no objection to your managing the house according to your pleasure."

The Subordinate Judge found that the house was liable to sale in execution against Ravji Raghunath subject to the defendant's right to enjoy it till her death, and decreed the claim making the declaration sought.

The defendant appealed, and the District Judge reversed the decree.

The plaintiff preferred a second appeal.

Vasudeo Gopal Bhandarkar for the Appellant. — The question is whether the appellant, who is the judgment-creditor of Ravji, is entitled to sell the house in dispute in execution of his decree. The effect of the deed made by Ravji in his mother's favour is to give her only a life-estate, and Ravji has a vested right in remainder. *Herabai v. Lakshminbai*, 11 L. R., 11 Bom., 573, *Seth Mulchand v. Bai Muncha*, 1 L. R., 3 Bom., 491; *Koonjbehari v. Premchand Dutt*, 1 L. R., 5 Cal., 684. Unless an express power of alienation is given to the widow in the document it is not binding. *Ganpat Rao v. Kam Chandar*, 1 L. R., 11 All., 296. *Umrao Chunder Sirkar v. Zahur Fatima*, 1 L. R., 18 Cal., 164. The present is, therefore, not a case of contingent interest, and consequently it does not fall under the provisions of section 266 (k) of the Civil Procedure Code.

Mahadeo Chimnaji Apte, for the Respondent. — Though the document does not authorize the mother to alienate, still the question with respect to succession after her death is to be taken into consideration. If Ravji be not alive at the time, some other person would succeed, but if he be living he would succeed as heir to his mother. His interest is, therefore, contingent and not a vested remainder. Consequently the case is governed by section 266 (k) of the Civil Procedure Code — *Haji Chander Tantra Doss v. Dharmo Narain Chuckerbutty*, 15 W. R., Full Bench, 17. Under the [505] document the son has given up all his rights to the property till his mother's death, and his interest is contingent upon his surviving her. During the life-time of the mother, at least, his interest being contingent, it cannot be sold — *Beebe Tokai Sherob v. David Mullick Ferozdoon*, 6 Moore's I. A., 510. Under the document the mother has become absolute owner, because at the outset the document purports to be *malaki putra* (deed of ownership). Further, in the body of the document it is distinctly stated that she is made the full owner, and is to deal with the property as she likes.

Candy, J. — We are unable to agree with the view taken by the District Judge, that Ravji had no saleable interest in the house, on the ground that the conveyance executed by him in favour of his adoptive mother was an absolute transfer of full ownership, and, therefore, Ravji's right to succeed to the property on his mother's death, if she still had an interest in it at the time of her death, was, as a mere contingent interest, not liable to attachment and sale under the Civil Procedure Code. We think in the case of gifts as in the case of wills, that the well-established rule must be followed, *i.e.*, that in the absence of express words showing such an intention, a gift to a woman does not confer an absolute estate of inheritance which she is enabled to alienate (see *Herabai v. Lakshminbai*, 1 L. R., 11 Bom., 573, and *Koonjbehari v. Premchand Dutt*, 1 L. R., 5 Cal., 684).

It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are enabled to alienate (*Mahomed Shumsool v. Shewukram*, L. R., 2 I. A., 7, at p. 14). Now what are the surrounding circumstances here? It is admitted that defendant, the adoptive mother, is over 80 years old; and the deed A recites that Ravji makes over to her the house in question (which is admittedly the only ancestral property remaining in the family) as a provision for her maintenance. She is to support herself by "the rents, &c., of the house." There are no words giving her [506] expressly the power to alienate the property. She is made *owner* thereof, but that is quite consistent with a life-interest. We have no doubt, therefore, that the Subordinate Judge was right in holding that the surrounding circumstances show that the house was revertible to Ravji on the lady's death. If so, then Ravji had a saleable interest in the house during the lady's life. The Subordinate Judge quoted a case in which the rights of an adopted son in the family property were, by express agreement, deferred till the death of his adoptive mother—see *Chitko Raghunath v. Janaki*, 11 Bom. H. C. Rep., 199, and this Court held in Second Appeal, No. 547 of 1888, decided 18th December 1889, that such rights could be attached and sold. Whatever may have been the rulings under Act VIII of 1859, it is clear that, under the present Civil Procedure Code, Ravji's interest could be attached and sold. The lady had an estate for life with power to appropriate the profits; and Ravji had what would be termed in the phraseology of English law a vested remainder on her death (*Cf. Bhagbutti v. Bholanath*, L. R., 2 I. A., 256 at pp. 259 and 260). Such a property is capable of being attached under section 266, Civil Procedure Code. It does not fall within the description of an expectancy or of a merely contingent or possible right or interest (*Umes Chander Sircar v. Zahur Fatima*, I. L. R., 18 Cal., 164). Under these circumstances we must reverse the decree of the District Judge and restore that of the Subordinate Judge, with all costs on defendant.

Decree reversed.

NOTES.

[As regards the extent and application of the presumption of only a limited estate being conveyed by a gift to a Hindu woman, see also (1905) 32 Cal., 1051; (1904) 29 Bom., 306; (1897) 22 Bom., 984; (1894) 19 Bom., 36; (1901) 3 Bom. L. R., 790; (1903) 6 Bom. L. R., 625; (1899) 1 Bom. L. R., 303; (1906) 1 S. L. R., 211; (1906) 9 O. C., 119.

[507] APPELLATE CIVIL.

The 6th September, 1892.

PRESENT.

MR. JUSTICE PARSONS AND MR. JUSTICE TELANG.

Roshanlal (Original Defendant) Applicant

versus

Lachmi Narayan (Original Plaintiff) Opponent.

Presidency Small Cause Courts Act (XV of 1882), Sec. 37—Decree—Ex parte decree—Application to set aside ex parte decree—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 164.

Section 37 of the Presidency Small Cause Courts Act (XV of 1882) does not apply to an *ex parte* decree.

* Application, No. 110 of 1892.

An application to set aside an *ex parte* decree passed by a Presidency Court of Small Causes falls within the terms of section 108* of the Code of Civil Procedure (Act XIV of 1882), and the period of limitation for such an application is thirty days as prescribed by article 164 of the Limitation Act (XV of 1877).

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

One Lachminarayan Makhanlal filed a suit in the Presidency Court of Small Causes to recover a sum of Rs. 1,999-15-6 from the applicant Roshanlal Gokhal.

Roshanlal was described in the plaint as residing at Hatras and carrying on business in Bombay by his *munim*, Jaganath Badridas.

The summons issued to the defendant Roshanlal was served upon his alleged *munim*, who it appears did not communicate the fact of the service to Roshanlal.

The suit came on for hearing on the 22nd March 1892, when an *ex parte* decree was passed against Roshanlal.

The decree was transferred for execution to the Court of the Subordinate Judge at Aligarh, in the North-West Provinces, within whose jurisdiction the defendant was residing.

On the 9th April 1892, certain property belonging to the defendant was attached in execution of the decree.

Thereupon the defendant applied to the learned Judges of the Small Cause Court at Bombay to set aside the *ex parte* decree, alleging that he had not been served with the summons, and [508] that Jaganath Badridas was not his *munim*, and had no authority to accept service on his behalf.

On the 3rd May 1892, this application was rejected as time-barred under section 37 of the Presidency Small Cause Courts Act XV of 1882.

The defendant Roshanlal thereupon made the present application to the High Court under its revisional jurisdiction.

A rule *nisi* was granted, calling upon the plaintiffs to show cause why the *ex parte* decree should not be set aside.

Jardine (with Bharshankar Nanabhai) showed cause:—The present case falls under section 37 of the Presidency Small Cause Courts Act (XV of 1882). That section applies to every decree and order of the Small Cause Court, except a decree based upon an award. An application to set aside an *ex parte* decree must, therefore, be made within eight days as provided by that section. The procedure laid down by section 108 of the Code of Civil Procedure (XIV of 1882) and the period of limitation prescribed by article 164 of the Limitation Act (XV of 1887) are inconsistent with the special procedure laid down in section 37 of the Small Cause Courts Act. They are, therefore, inapplicable under section 23 of the latter Act. In the present case the application to set aside the *ex parte* decree was made more than a month after the date of the decree. It is, therefore, time-barred.

Hart (with him Manekshah Jahangirshah) contra:—The procedure laid down in section 108 of the Code of Civil Procedure (XIV of 1882) is the only procedure to be adopted for setting aside an *ex parte* decree. It is not inconsistent with the provisions of section 37 of the Small Cause Courts Act, which

Setting aside decree *ex parte* against defendant. * [Sec 108:—In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside;

and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit.]

contemplates cases in which a decree is to be reviewed or a new trial sought. To such cases alone the eight days' limitation applies. An application to set aside an *ex parte* decree is governed by article 164 of the Limitation Act (XV of 1877). The present application is, therefore, within time.

Parsons, J. :—We think the Chief Judge of the Small Cause Court was wrong in applying to the application under review the provisions of section 37 of the Presidency Small Cause Courts Act, 1882, and the period of eight days' limitation therein prescribed. The application was one to set aside a decree that had been passed *ex parte* against the applicant. It comes strictly within the terms of section 108 of the Code of Civil Procedure, and the period of limitation for an application made under that section is thirty days from the date of executing any process for enforcing the judgment (see Act XV of 1877, Schedule II, article 164). Section 108 is one of the sections comprised in Chapter VII of the Code of Civil Procedure, the whole of which is in terms extended to the Court of Small Causes by section 23 of the Presidency Small Cause Courts Act, 1882, which provides that the procedure prescribed thereby shall be followed, except where such procedure is inconsistent with the procedure prescribed by any specific provisions of this Act. It is argued that the procedure prescribed in section 108 is inconsistent with the procedure prescribed in section 37 of the Act. We cannot assent to this argument. Section 37 deals with new trials and revisions of decrees and orders. The procedure under which *ex parte* decrees may be set aside is in no way inconsistent with a procedure under which a decree or order may be reviewed or a new trial ordered. Both exist under the Code of Civil Procedure, and there is no reason why both should not exist under the Small Cause Courts Act. In fact the intention that both should exist seems beyond doubt. Section 108 contains a procedure by which *ex parte* decrees alone can be set aside, and its extension to the Court of Small Causes would be quite meaningless if they could also be set aside under some specific provision contained in the Act itself. The period of limitation allowed by section 37 is so short that that circumstance by itself militates strongly against the supposition that the section applies to *ex parte* decrees.

We make the rule absolute. We send back the application to be disposed of under the provisions of section 108 of the Code of Civil Procedure on its merits. We order the costs of this rule to be costs in the application before the Small Cause Court.

Rule made absolute.

[510] APPELLATE CIVIL.

The 6th September, 1892.

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE TELANG.

Pitamberdas.....(Original Plaintiff) Applicant
versus

Jambusar Town Municipality.....(Original Defendant) Opponent.

Estoppel—Tax—Payment of a tax for one year without protest—Payment of the tax in a subsequent year under protest—Suit to recover money so paid—Cause of action.

The plaintiff paid a house tax, at the rate of Rs. 6 for the year 1890 without any protest. When the tax was sought to be levied from the plaintiff at the same rate for the year 1891, he objected to the levy as illegal and excessive, and paid the tax under protest. He then sued to recover what he alleged was an excess charge of Rs. 5 in respect of the tax for 1891. His claim was rejected on the ground that he was estopped from recovering the alleged excess by reason of his having paid the tax for 1890 without protest.

Held, that the suit was not barred. The levy of a tax in each year gives a new and distinct cause of action, and the payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

This action was instituted by the plaintiff against the Town Municipality of Jambusar to recover Rs. 5, which he alleged to be an excess charge in respect of the house tax levied from him for the year 1891.

The plaintiff alleged that his house had been overvalued for the purpose of the tax; that though he was liable to pay the tax at the rate of Rs. 1 only, a tax of Rs. 6 per year had been levied from him for the years 1890 and 1891.

The Subordinate Judge held that as the plaintiff had paid the tax at the rate of Rs. 6 without any protest for the year 1890, he was estopped from recovering the alleged excess charge for the year 1891. He also held that the suit was barred by limitation. He, therefore, rejected the plaintiff's claim.

Against this decision the plaintiff applied to the High Court under its revisional jurisdiction.

[511] *Nagindas Tulsidas* for the Applicant.

There was no appearance for the Opponent.

Parsons, J. :—The decision of the Subordinate Judge with Small Cause Court powers on the first issue is not according to law. Plaintiff paid the house tax at the rate of Rs. 6 for the year 1890 and also for the year 1891. He sued for the recovery of what he alleged was an excess charge of Rs. 5 in respect of the tax for the year 1891 only. The Subordinate Judge held that the fact of his not having issued a notice, or presented an application against the charge of Rs. 6 for the year 1890, barred—that is, estopped—him from bringing the present suit. But this is not so. The levy of the tax in each year would give a new and distinct cause of action, and the payment of the tax without protest for one year

* Application No. 100 of 1892.

would not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year on the plaintiff.

With reference to the finding on the 4th issue (that the suit is time-barred), we would observe that if the valuation of the plaintiff's house was made annually, a fresh cause of action in respect of overvaluation would also arise annually even if the valuation remained the same; and the fact that no objection had been made to the valuation for the year 1890 would not render this suit, which is based on an alleged overvaluation for 1891, time-barred. It would be in time, provided that it is brought within the period allowed by section 48 of the Municipal Act of 1884 counting from the date of the act complained of, that is, the overvaluation made in 1891.

We make the rule absolute, and return the case for trial on the merits. Costs of this application to be costs in the cause.

Rule made absolute and case remanded.

[512] APPELLATE CIVIL.

The 27th September, 1892.

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE TELANG.

Bhasker Tatya Shet and others (Original Defendants) Appellants
versus

Vijala¹ Nathu..... (Original Plaintiff) Respondent.

Limitation Act (XV of 1877), S. c. 19—Acknowledgment—Manager of a joint Hindu family—His authority to acknowledge a family debt—Hindu law—Manager.

The manager of a joint Hindu family has authority to acknowledge the liability of the family for the debts which he has properly contracted, so as to give a new period of limitation against the family from the time the acknowledgment is made. He is an agent duly authorised in this behalf within the meaning of section 19† of the Limitation Act XV of 1877.

Chinnaya Nayudu v. Gurunatham Chetti, I. L. R., 5 Mad., 169, followed.

* Second Appeal No. 334 of 1891.

† [Sec. 19:—If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment

Effect of acknowledgment in writing.
liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section “signed” means signed either personally or by an agent duly authorized in this behalf.]

SECOND APPEAL from the decision of Rao Bahadur G. A. Mankar, First Class Subordinate Judge of Thana, A.P.; in Appeal No. 204 of 1889 of the District File.

The plaintiff sued to recover Rs. 632-3-3 as principal and Rs. 64-4-9 as interest due on a *khata* or account adjusted and signed by defendant No. 1 on 7th November 1885.

The plaintiff sought to make the defendants Nos. 2, 3 and 4 also liable to pay the debt in question, on the ground that they were younger brothers of defendant No. 1 living in union with him; and, therefore, bound by his acts as a manager of a joint Hindu family.

Defendant No. 1 admitted the plaintiff's claim.

Defendants Nos. 2, 3 and 4 pleaded that the debt in question was not incurred for the benefit of the family, and that defendant No. 1 had no authority to bind them by executing the *khata* sued upon.

Both the lower Courts awarded the plaintiff's claim as against all the defendants, holding that the defendant No. 1 had contracted the debt as a manager for the benefit of the family, and that the *khata* sued upon was binding on all the defendants.

Against this decision defendants Nos. 2, 3 and 4 preferred a second appeal to the High Court.

[513] *Vasudev Gopal Bhandarkar*, for Appellants:—The *khata* sued upon is an acknowledgment of a debt. The question is, whether it is a sufficient acknowledgment within the requirements of section 19 of the Limitation Act (XV of 1877). I contend that the manager of a joint Hindu family has no authority to acknowledge a debt due by the family so as to keep it alive. He is not an "agent duly authorised in this behalf" within the meaning of section 19 of the Act—*Kumarsami Nadan v. Pala Nagappa Chetti*, 1 L. R., 1 Mad., 385, and *Mayne on Hindu Law*, section 308.

Rao Saheb *Vasudev J. Kirtikar* for the Respondent, was not called upon.

Parsons, J.:—The finding of the Court below that the debt was contracted by the first defendant, the manager of the family, for the benefit of the family is binding upon us in second appeal, and we see no reason to interfere with it on the ground of any presumption being illegally made, or *onus* wrongly placed.

The only other question argued before us relates to the power of the manager of a joint Hindu family to acknowledge the liability of the family in respect of a debt which is not at the time barred by the law of limitation, so as to give a new period of limitation against the family from the time when the acknowledgment is signed. The answer to the question, which is one that arises under section 19 of the Limitation Act, 1877, depends upon whether the manager is an agent of the family, duly authorised in this behalf. In the case of *Kumarsami Nadan v. Pala Nagappa Chetti*, 1 L. R., 1 Mad. 385, it was held that "the relation of the managing member of a Hindu family to his co-parceners does not necessarily imply an authority upon his part to keep alive, as against his co-parceners, a liability which would otherwise become barred." This case was referred to, apparently with approval, by a Bench of this Court in *Naranji v. Bhagvandas*, P. J., 1881, p. 238. Since then, however, the Full Bench of the Madras High Court in *Chinnaya Nayudu v. Gurunatham Chetti*, 1 L. R., 5 Mad., 169, has decided that "a manager has authority to make payments for the family, he has the same authority to acknowledge as he has to create debts." This later decision appears to us to be correct, [514] and we follow it. We can see no practical difference between the power to create a debt and the power to acknowledge a liability for the debt so created. Ordinarily the power to do the one impliedly involves the power to do the other.

No greater authorisation is needed for the one act than for the other. If, then, by Hindu law the manager of the family has under certain conditions authority to contract debts for which the family is liable, he has by the same law authority to acknowledge the liability of the family for the debts which he has properly contracted. This latter authority is, we think, entitled equally with the former to be considered a part of the functions of that member who is managing on behalf of the family. The exercise of such an authority must often be necessary and may be very beneficial to the family. In our opinion the manager must ordinarily be held to be an agent duly authorised in this behalf within the meaning of section 19 of the Limitation Act, 1877. Evidence may of course be adduced in each case of facts or circumstances to show the contrary, but there is no such evidence in this case, the appellants having rested their defence upon the allegation that the family was not joint when the acknowledgment in question was made. We confirm the decree with costs.

Decree confirmed.

NOTES.

[This was followed in (1894) 18 Mad., 456 (guardian), (1907) 9 Bom. L. R., 1289 (manager of a joint Hindu family); (1910) 14 C.W.N., 711 · 11 C.L.J., 484 (*ibid*); (1910) 20 M.L.J., 808 at 811 (Court of Wards). See also (1901) 3 Bom. L.R., 144; (1894) 20 Bom., 61.]

[17 Bom. 515]

ORIGINAL CIVIL.

The 11th and 23rd March, 1893.

PRESENT.

MR. JUSTICE STARLING AND SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE TELANG.

In re Premji Trikumdas.¹

Civil Procedure Code (XIV of 1882), Sec. 267—Practice—High Court Rule No. 183—Order made by a Judge in chambers on client to pay taxed costs of his attorney—Right of attorney to execute such order as a decree—

Application under Section 622 of Civil Procedure Code (XIV of 1882) to review such order.

An order obtained from a Judge in chambers by an attorney against his client for the payment of costs is a decree or order, to the execution of which the provisions of Chapter XIX of the Civil Procedure Code (XIV of 1882) apply.

[515] Section 267 of the Civil Procedure Code is applicable to all the property of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale.

The words "liable to be seized" contained in section 267 of the Civil Procedure Code are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the decree.

Property of a judgment-debtor which he has mortgaged is *prima facie* liable to be seized in execution of a decree against him, and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt.

¹ In the matter of Suits, Nos. 657 of 1869; 421 of 1883; 374 of 1890; 613 of 1890; 461 of 1891 and 580 of 1891.

A person may be examined, under section 267, in respect of property which is *prima facie* the property of the judgment-debtor, although such person may allege that he is a mortgagee in possession of the attached property.

Section 622 of the Civil Procedure Code (XIV of 1882) does not apply to a case where the order of which review is sought, is made by the High Court. The Court referred to in section 622 is a Court other than the High Court.

SUMMONS in chambers.

On the 26th January 1893, Messrs. Bhaishankar and Kanga, attorneys, took out a summons calling on Premji Trikumdas to show cause why he should not be ordered to pay to them a sum of Rs. 6,256-2-1, being the balance of taxed costs due to them in respect of certain suits in which they had acted as his attorneys. The summons was obtained under Rule 183 of the High Court Rules, which is as follows :—

"An attorney, when he has taxed his bill of costs against his client, may obtain an order in chambers for payment of the sum allowed on taxation, and such order may be executed under Chapter XIX of the Code of Civil Procedure."

On the 6th February 1893, the above summons was made absolute, and Premji Trikumdas was ordered to pay Messrs. Bhaishankar and Kanga the said sum of Rs. 6,256-2-1.

On the 9th February 1893, Mr. Bhaishankar Nanabhoy, the senior partner of the firm of Bhaishankar and Kanga, filed an affidavit, in which he alleged that the said Premji Trikumdas was concealing himself, and keeping out of the way, in order to delay and defeat the execution of the above order passed against him. He further alleged that Premji Trikumdas had mortgaged certain immoveable property to his wife, Premabai, and had pledged valuable ornaments to a Marwari, Jana Ookha, and that these three persons, *viz.*, Premji Trikumdas, Premabai, and Jana Ookha, were able to give information as to property liable to be attached in execution of the said order.

Upon this affidavit an order was obtained on the 9th February 1893, under section 267 of the Civil Procedure Code (XIV of 1882), requiring Premji Trikumdas, his wife Premabai, and Jana Ookha to attend before the Judge in chambers to be examined in respect of any property in their possession liable to be seized in satisfaction of the order of the 6th February 1893, and to answer all such questions as might be put to them, &c., and requiring the said Premabai to produce all deeds and documents relating to any of the immoveable property mortgaged, or alleged to have been mortgaged, with her by the said Premji Trikumdas, &c.

Premabai thereupon filed an affidavit in which she stated that on the 3rd December 1891, Premji Trikumdas had mortgaged certain immoveable property to her, and that having failed to pay her the interest due on the mortgage he had given her possession of the property on the 21st October 1892, since which date she had continued in possession; and that on the 9th February Messrs. Bhaishankar and Kanga had attached the said property under an order of 6th February 1893. On the allegations contained in this affidavit she, on the 17th February 1893, obtained a summons calling on Messrs. Bhaishankar and Kanga to show cause why the above order of the 9th February 1893, should not be set aside.

The summons now came on for hearing.

Macpherson, for Messrs. Bhaishankar and Kanga, showed cause.

Jardine, for Premabai, in support of the summons.

The following authorities were referred to:—*Bhugobat Singh v. Ram Adhin Singh*, 22 W. R., 330, Civ. Rul.; *Maharajah Rajendro Kishore Singh Bahadoor v. Hyalul Singh*, 17 W. R., 379, Civ. Rul.; *Kassirav v. Vithaldas*, 10 Bom. H. C. Rep., 100; Civil Procedure Code (XIV of 1882), sections 267, 647—649.

13th March 1893. **Starling, J.**:— In this matter Mr. Bhaishankar, on having obtained an order for payment of costs in a number [517] of suits against his client Premji Trikumdas, attached certain property of which Premji was the owner, but which it was alleged he had mortgaged to his wife, Premabai, and of which he subsequently put her in possession.

On the 9th February 1893, Mr. Bhaishankar obtained an *ex parte* order from me under section 267 of the Civil Procedure Code, directing Premabai to appear and be examined. On the 17th February 1893, Messrs. Bicknell, Merwanji and Motilal on behalf of Premabai obtained a summons from me calling upon Mr. Bhaishankar to show cause why that order should not be set aside.

The grounds on which the order was sought to be set aside were that Mr. Bhaishankar was not a decree-holder; that the section only applies to property which, under the decree, had to be given up in specie; and that, if it did apply to property which could be attached and sold in execution of a decree, then that the property in question was not "liable to attachment, as Premabai was a mortgagee in possession, and that this property was not liable to be seized," as it had already been attached.

Section 267 provides that "the Court may, . . . on the application of a decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized in satisfaction of the decree, &c." Now, the High Court Rule No. 183 provides that "an attorney when he has taxed his bill may obtain an order in chambers for payment of the sum allowed in taxation, and such order may be executed under Chapter XIX of the Code of Civil Procedure." Section 647 of the Civil Procedure Code provides that "the procedure prescribed in the Code shall be followed in all proceedings in any Court of civil jurisdiction other than suits and appeals;" and section 649 provides that "the rules contained in Chapter XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a civil Court in any civil proceeding."

Taking all these provisions together I must hold that an order obtained by an attorney against his client for the payment of costs is a decree or an order to the execution of which the provisions of Chapter XIX of the Code apply; and as section 267 is [518] a portion of that chapter, its provisions are also applicable to proceedings taken in the execution of such an order. Then, is property, which is desired to be attached in execution of a money decree, "property liable to be seized in execution of a decree"? I think it is. The words are not "property ordered to be delivered under or in execution of a decree" which might limit the powers of the Court to the ascertaining what the property was to which the decree referred, but "property liable to be seized in *satisfaction* of a decree," and, in my opinion, the word "satisfaction" causes the section to be applicable to all the property of the judgment-debtor out of which the decree can be satisfied, either by delivery in obedience to the decree, or by sale.

I am further of opinion that the words "liable to be seized" do not point to any particular period of time at which the enquiries may be made, so as to confine the operation of the section to a period anterior to the issue of process, but are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the

decree. The only point now to be determined is whether the allegation by Premabai, that she is a mortgagee in possession, prevents the property being "property liable to be seized." The property in question is admittedly the property of the judgment-debtor, and, therefore, *prima facie*, is liable to be seized in execution of a decree against him; and the fact that he has mortgaged it, will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt.

It is quite true that a mortgagee in possession may come in and get removed an attachment against the property of which he is in possession; yet I do not think that the fact that the person who is sought to be examined alleges, even on oath, that he is a mortgagee in possession (such allegation not having been tried and determined by the Court) deprives the Court of the power to order such a person to be examined respecting the property, because it must be remembered that at the time the order has to be made, in all probability it is not known whether the mortgagee is in possession or not, and it is possible that, on examination, the Court might be of opinion that the examinee was either not in possession at all, or not in possession *as mortgagee*, [519] and thereafter order an attachment to be placed or continued on it. To hold that such an allegation would prevent the Court examining such a person, would be, in my opinion, placing a premium upon judgment-debtors setting up persons to prefer false claims as mortgagees in possession, and would thus hamper the Court in giving to judgment-creditors that assistance to which they are entitled at its hands. Consequently I hold that the order of 9th February 1893, was rightly made, and the summons of the 17th February 1893, must be dismissed with costs. Counsel certified for.

Summons dismissed.

On the 23rd March 1893, Lang (Acting Advocate General) on behalf of Premabai applied to the Court (consisting of SARGENT, C. J., and TELANG, J.,) in its extraordinary jurisdiction for revision of the order made by STARLING, J., on the 9th February 1893, under section 622 of the Civil Procedure Code (XIV of 1882), and for a rule *nisi* calling on Messrs. Bhaishankar and Kanga to show cause why the said order should not be set aside, and also for an *interim* stay of the said order.

Sargent, C. J. :—We do not think we have power to grant the application under section 622. That section does not seem to apply to a case like this, where the order, of which a review is sought, was made by the High Court. We think the Court referred to in the section, whose records may be called for, is a Court other than the High Court, and we must, therefore, refuse this application.

Application refused.

Attorneys :—Messrs. Bhaishankar and Kanga, and Messrs. Bicknell, Merwanji and Motilal.

NOTES.

[See also (1901) P. L. R., 45.]

[520] ORIGINAL CIVIL.

The 17th and 18th March, 1893.

PRESENT :

MR. JUSTICE FARRAN, and on appeal, SIR CHARLES SARGENT, KT.,
CHIEF JUSTICE, AND MR. JUSTICE STARLING.

Jafferbhoy Ludhabhoy Chattoo.....(Defendant) Appellant

versus

Thomas D. Charlesworth and others.....(Plaintiffs) Respondents.*

*Principal and agent—Principal and factor—Consignment for sale—Advances
by factor on consignment—Right of factor to sell goods consigned to him for
sale below the limit of price prescribed by consignor.*

In January 1889, an agreement was made between the plaintiffs and the defendant which provided that the defendant in Bombay was to act for the plaintiffs "in influencing consignments of produce" to the care of the plaintiffs in London. Such produce was to be sold by the plaintiffs in London for a certain commission and brokerage. One of the terms of the agreement was that the business in England was to be worked entirely in the defendant's name and the defendant was to "undertake to guarantee the plaintiffs free of all loss in connection with the said consignments and to guarantee the payment of redrafts, &c."

On the 25th January 1889, the defendant consigned 435 packages of cloves to the plaintiffs in London and drew against the consignment a draft for £2,100 on the plaintiffs. In his consignment letter the defendant stated that the consignment was from his constituent Chatterbhuj Khimji, but that as Rs. 30,000 had been advanced to him, the consignment was shipped in the defendant's name. The letter continued: "The cost is 9½d. per pound, but he expects more, and not to be sold under the above rate."

The sum drawn against the cloves (£2,100) was £100 in excess of their value, and on receipt of the consignment letter on the 11th February 1889, the plaintiffs at once telegraphed to the defendant to remit by cable £100 against overdraft against cloves. On the next day the defendant replied by telegraph: "I will remit you by outgoing mail." The plaintiffs accepted and paid the draft for £2,100 drawn against the cloves.

The price of cloves in the London market fell rapidly. The defendant from time to time lowered the limit of price, but not to such an extent as to allow of a sale being effected. The lowest limit named by him was 6d. per pound on the 31st October 1889. In December 1889, the market price was only 5d. per pound, and the deficit owing to the plaintiffs was £1,300. The plaintiffs presented bills to the defendant for this balance, but they were refused.

On the 5th February 1890, after due notice to the defendant, the 435 bales of cloves were sold, 20 of them at 4½d. per pound and 415 at 4¼d. The balance due to the plaintiffs in respect of this consignment, after allowing for the proceeds of sale, were £1,432-15-0. This sum was part of the amount for which the present suit was brought. The defendant contended that the plaintiffs were not justified in selling the cloves below the price limited, viz. 6d. per pound, and claimed to be credited with [521] £329-1-8, which was the difference between the amount actually realized by the sale and the amount which would have been obtained if the cloves had been sold at the prescribed price.

He'd by FARRAN, J., and by the Court of Appeal, on the evidence,

(1) that the plaintiffs had accepted the consignment and had advanced money against it on condition of being kept in funds in case a deficit should arise, owing to a falling market, and that the defendant acquiesced in that condition;

* Suit, No. 139 of 1890; Appeal, No. 735.

(2) that the plaintiffs had throughout claimed the right to sell if the condition was not observed, and that the defendant had inferentially admitted the right claimed by the plaintiffs. The conclusion to be drawn was that the business was conducted on that basis, and that when the condition was broken the plaintiffs' right to sell arose according to the course of business, notwithstanding the limit of price imposed by the defendant.

Per SARGENT, C. J.—The result of the authorities is to show that where a factor for sale, who has made advances, claims the right to sell, *invito domino*, the question is whether there was an agreement between the parties, either express or to be inferred from the general course of business or from the circumstances attending the particular consignment, that the factor should under any and what circumstances have the power to sell against the wish of the owner of the goods. The *onus* of proving such agreement lies on the factor who has made the advances.

Per FARRAN, J.—On the whole the authorities warrant the inference that where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission, and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to his principal, although the latter may place a limit on their sale, and desire to hold them on if the principal do not put his factor in funds to make up the deficit so caused.

THE plaintiffs carried on business in London. The defendant was a merchant in Bombay. The suit was brought by the plaintiffs in March 1890, to recover from the defendant a sum of £1,512-15-11 (then equivalent to Rs. 22,000 4-10) as the balance due to them on consignment transactions which had been carried on between them.

The defendant had made, or caused to be made, various consignments of goods to the plaintiffs for sale in England, against which (as the plaintiffs alleged) bills had been drawn upon them for amounts larger than the value of the consignments. The plaintiffs had paid these bills and had sold all the consignments, the result being that the above-mentioned sum claimed in the suit remained due to the plaintiffs in respect of these transactions.

[522] The defendant did not admit the correctness of the plaintiffs' account, and the suit was referred to the Commissioner for taking accounts. He reported that a sum of £ 1,314-10-0 was due by the defendant to the plaintiffs on the 9th March 1890. The defendant filed exceptions to this report, the most important exception being with reference to a certain consignment of cloves, which had been sold by the plaintiffs below the limit of price prescribed by the defendant. The defendant contended that in the account they were entitled to charge the plaintiffs with the highest price obtained for cloves at any time subsequent to their sale, or at all events the difference between the price obtained by the plaintiffs and the price limited by the defendant.

From the evidence it appeared that prior to the year 1889 the plaintiffs and the defendant had done business with each other. In January 1889, however, one of the partners in the plaintiffs' firm visited Bombay, and a new arrangement was come to between them with regard to the terms in which the business was subsequently to be carried on. This arrangement was a verbal one, but the following letters passed between them:—

“ 7th January, 1889.

“ To LUDHABHOY CHATTOO, ESQ.

“ Dear Sir,—I have now the pleasure to re-state the arrangement verbally agreed upon between us in regard to the proposed increase in consignment business between our two houses. Briefly stated, the leading points are:—

“ That you will act for us in influencing consignments of produce (cotton to be excepted) to our care.

"The business on this side to be worked entirely in your name, and you undertake to guarantee us free of all loss in connection with the said consignments, and you guarantee the payment of our redrafts, &c.

"It is distinctly understood that the entire business in Europe is to be confined to ourselves, the only exception being in such cases where dispute may arise between us and any of your consignors, in which event, should the latter so wish and with the object of retaining that particular connection, the consignment in question may be entrusted to some other London house until the dispute may be settled.

"We on our part agree to a net commission and brokerage of $1\frac{1}{2}$ per cent. The only exception to this will be in the case of hides and any other goods on which the customary London brokerage is 1 per cent., and in such instances our inclusive charge will be 2 per cent. for commission and brokerage.

[523] "Awaiting your confirmation and agreement to the foregoing terms, and trusting a large trade may arise between us to our mutual benefit,

"I am, &c.,

"(Signed) W. B. CHARLESWORTH."

The defendant's reply was as follows:—

"Bombay, 11th January, 1889.

"To W. B. CHARLESWORTH, ESQ.

"In reply to your letter of the 7th instant, we agree to the terms therein stated.

"Yours, &c.

"(Signed) LUDHABHUY CHATTOO."

The plaintiff was examined on commission in London, and he swore that, besides the points referred to in his above letter of 7th January, the verbal arrangement included two other terms, *viz.*:—

(1) That in all drafts drawn by the defendant on the plaintiffs against consignments, there should be a margin of 20 per cent. between the amount of the draft and the value of the goods exclusive of charges.

(2) That whenever that margin was not kept up owing to a fall in the market, the plaintiffs were to draw on the defendant.

No sworn evidence was given by the defendant as to whether or not these terms formed part of the agreement between him and the plaintiffs. From the cross-examination of the plaintiff, however, it appeared that the defendant did not admit them, and in a letter written by him to the plaintiffs dated 15th February 1889, which was put in evidence by the plaintiffs, it was alleged that the agreement was only that, when the deficit was found to amount to £1,000, the plaintiffs were to draw on the defendant for the amount. This version of the agreement was, however, at once repudiated by the plaintiffs in their letter of reply dated 8th March 1889, in which it was said that to allow the deficiency to reach £1,000 "would, by obliging them to keep so large a sum locked up for months, cause the greater part of their commission to disappear." The plaintiff also swore in his evidence that no arrangement of that kind had been made.

The consignment in question, which consisted of 435 packages of cloves, was made by the defendant in January 1889. The goods [524] were the property of Chatterbhuj Khimji, one of the defendant's constituents. Before shipping them to England the defendant advanced upon them to Chatterbhuj the sum of Rs. 30,000. He then consigned the goods in his own name to England and drew against them on the plaintiffs for £2,100. The following was the material part of the consignment letter:—

"25th January, 1889.

"Messrs. THOMAS D CHARLESWORTH & Co.,
"London.

"Dear Sirs,—We have to acknowledge the receipt of your favour of the 4th instant, and thank you for informing us fully with the tone of the different markets, which please continue by every one.

"We have by the present mail consigned to your good care 435 packages of cloves and five cases of fishmaws per S. S. 'Clan Sinclair' and drawn against the same for £2,100 and £5 respectively. Please accept on presentation. . . .

"The consignment of cloves is from our constituent Mr. Chatturbhuj Khimji; but as we had advanced Rs. 30,000 to him since a month, we have shipped the same in our own name. He is a very large shipper of cloves and generally consigns them to Messrs. A. D. Sassoon and E. D. Sassoon & Co.; but a great deal of persuasion from us and promise to pay special attention and care on the sale and expenses, made here personally by your Mr. Williams, has given it to us. We need not, therefore, say any more about it, but we are sure that you will try your utmost to fetch the highest prices. The cost is 9½d. per pound, but he expects more, and not to be sold under the above rate. He has also requested us to write to you, that he has consigned to Messrs. David Sassoon & Co. 600 packages of cloves sold by them to arrive, but from their recent letter he finds that dispute might arise, if so, he will telegraph to you through us to look to his interest and appoint a surveyor, which please do if needful. . . .

"We have, &c., &c.,
 "(Signed) LUDHABHOY CHATTOO."

In his evidence the plaintiff stated that the amount of £2,100 was not a fair sum to draw against the cloves. The sum should not have exceeded £1,625. The defendant in his invoice valued the cloves at nine annas per pound. The price of "fair quality" cloves was only 9d. per pound, and the defendant's cloves were dark inferior cloves below the standard of fair quality.

On receipt of the consignment letter the plaintiffs on the 11th February 1889, telegraphed to the defendant in Bombay as follows:—"Please remit £400 for your overdraft on cloves per S. S. 'Clan Sinclair', reply immediately." The defendant replied by telegram dated the next day. "I will remit you by outgoing [525] mail." On the same day the plaintiffs received another telegram from Bombay purporting to come from one Tharia Topan guaranteeing the bills drawn by the defendant. The telegram was as follows:—

"Accept Ludhabhoy's bills. I guarantee.

"(Signed) THARIA TOPAN."

The plaintiffs accepted and paid the draft for £2,100 drawn against the cloves.

By the mail of the 15th February 1889, the plaintiffs addressed the following letter to the defendant with reference to the consignment in question:—

"We have your esteemed favour of the 25th January for further consignments, for which we are much obliged.

"435 bales cloves per 'Clan Sinclair' against which you draw £ 2,100. In doing so you appear to have made a considerable error in your calculations. Taking the cabled value at the time of shipment at 9d., and each bale at 131 lbs., net (a very outside) will give a gross value of £ 2,150

Loss charges, freight, &c. £ 325

£ 1,825

Margin as customary £ 200

£ 1,625

"We therefore cabled 11th instant: 'Empress cloves Sinclair Moroxite, or remit by cable £ 400 overdraft against cloves Clan Sinclair, reply immediately.' On following morning came your answer, that you would remit by mail; we also had telegram from Mr. Topan that he guaranteed you. Of course we know you cannot be responsible for all in market, though our advices have been persistent in anticipating a fall; but you appear to have overlooked entirely the loss of weight on the voyage, and the freight and charges. As pointed out by Mr. W. B. Charlesworth, your business can only be done on the terms named, provided we are kept in funds. Now, looking at your other consignments at present market prices, we calculate that, in addition to overdraft on 435 bales cloves, there is a deficiency of

between £500 and 600. Such style of business will not remunerate any one and is quite opposed to the understanding. In any further business please adhere strictly to this understanding. We very much regret the position the account has assumed, but we are not the cause, and we did not wire for a cable transfer through any doubt, but as *a matter of business entirely*. We enclose a memo. of our calculation, showing, irrespective of 435 bales cloves, a deficiency of £ 550. Against this we have to-day drawn upon you for Rs. 4,447-14-0, the equivalent of £ 300 at exchange $\frac{1}{2}$, $\frac{1}{2}$, at 15 d/s, in favour of the Chartered Bank of India, Australia and China, which please duly honour, leaving still a large balance against you.

[526] " Please note acceptance to your drafts as follows —

£ 2,100 a/c of 435 bales cloves 'Clan Sinclair' due 14th May.

£ 505 a/c issue glass do. 14th May.

" We will do our best with both. We note remarks as to appointment of a surveyor for 600 bales cloves, but there would be no need for our interfering in any way with the firm mentioned. Unfortunately a large quantity of the cloves received here from Bombay have been of mixed or inferior quality, which in a falling market has naturally been availed of by rival buyers whose claims for allowances have been large. These have been assessed by arbitrators in a fair and honourable manner ranging from $\frac{1}{4}$ to $\frac{1}{2}$ d. per lb., and indeed some lots have been so bad that the buyers thought seriously of refusing the quality tendered and bringing an action against the seller for breach of contract. A few good fair sold at $8\frac{1}{2}$, being $\frac{1}{4}$ lower, and other weak holders may also have to sell. Landed stock 15,000 bales with heavy supplies close at hand. Only an accident can improve us."

There was also a mail from Bombay to London on the 15th February 1889, and by that mail the defendant wrote the following letter to the plaintiffs with reference to the consignment of cloves :—

" In acknowledging the receipt of your favour of the 25th ultimo, we have also to acknowledge the receipt of your telegram, dated 11th instant, stating ' remit by wire £ 400 on account of our draft overdrawn against cloves ex S. S. 'Clan Sinclair,' in reply to which we cabled you that ' we will remit by the outgoing' mail,' and another telegram was also sent by our mutual friend, Mr. Thariabhoj Topan, saying 'I stand guaranteed. Accept Ludhabhoj's bills.'

" We are very much surprised to receive such a telegram from you, especially when a clear understanding was made between us and your Mr. Williams, at the time of the arrangements, that whenever you find the deficit amounting to £1,000 you are to draw against us for the amount, while only a very short time has passed, and you have grown impatient as to keep our bill standing, and wiring us to remit, otherwise you will not accept the said bills is . . . astounding; but we thank you for giving us such a lesson. You will know (that is, your Mr. Williams must have fully informed you) that we have been doing business with other firms from a long time, but only through strong personal persuasions of Mr. Williams and Mr. Fazlulbhoj (of Mr. Thariabhoj Topan) we consented to give the bulk of our business to you, and a very fair business was done in the last month, but are sorry to say that you have thought proper to terminate the arrangement so very soon. We cannot come to any conclusion what made you so very impatient and take alarm at such a paltry sum. However, to bring an end to this unpleasant matter, we have only to say that as there is no consignment by the present mail, we will remit by documentary bill by the next. We would not have waited till the next mail, but now, as you are safe enough for any deficit whatever, we have taken time.

" Hoping this will be sufficient,—We remain, &c."

[527] On the 21st February 1889, the defendant wrote again, enclosing to the plaintiffs a sum of £250, directing him to " credit the same to our general account, or to the deficit in cloves, just as you think proper." The letter then continued :—

" We consider the above amount to be sufficient to cover any deficiency in our overdrawn draft on the consignment of cloves per 'Clan Sinclair' for which you took alarm and cabled

us to remit even at the present low market, besides also you have our friend Mr. Thariabhoy Topan as guarantee. We have placed a limit of 9½d. on the said shipment, but on arrival, if you fail to obtain our limit, kindly wire the valuations, and consulting with our client Mr. Chatterbhuj Khimji we will send you a reply whether to hold or to sell the parcel. Please act accordingly, that is, if it is to be sold we will wire, but if it is otherwise we will not reply; be pleased then to hold the same for some time. But according to the information received from Zanzibar, as well as the strong market here, we hope the market on your side will also increase in a short time, but we have induced the shipper to lower down the limit to 9¼d."

In the London market the price of cloves fell rapidly. On the 8th March 1889, the plaintiffs wrote to the defendant enclosing a report and valuation of the cloves made by a broker. It described them as "dull and mixed," and valued them at 7½d. per lb., which was nearly 2d. under the limit fixed. The plaintiffs also enclosed an account showing that the deficiency on the consignment then amounted to £516. On the 13th March the defendant telegraphed to the plaintiffs: "Hold cloves; have mailed a remittance of £400." They followed this telegram by a letter dated the 15th March 1889, in which they said:—

"We have sent you a reply on the 13th that 'hold cloves; have mailed a remittance of £400' which we do by the present opportunity—that is, enclosed draft of £360 on Messrs. Heller and Weiss, of Mincing Lane, against documents of two different shipments of gum arabic per S. S. 'Huntingdon.' Please present them the bills, and receiving the amount credit the same to our general account, but hold the parcels each and all, on which limits are placed, till further instructions. Let us also tell you that you received from us in all (with your draft of £300 drawn by you), £360, and we may still regularly go on remitting from time to time, as we think fit, but if even upon this you are afraid of still more deficiencies and are willing to discontinue business with us foregoing your commission on all our unsold shipments in your hands, we are ready to have them transferred to our friends Messrs. Heller and Weiss, of Mincing Lane. If you agree to this, please wire only one word 'Jafferbhoy,' on the receipt whereof we will at once wire our above friends to take charge of all such shipments."

On the 29th March 1889, the plaintiffs wrote stating that the then price of cloves was 6½d. per lb. They enclosed *pro forma* [528] account sale, which showed the deficiency had then reached the sum of £760.

On the 18th June 1889, the price of cloves having fallen still lower, the defendant wrote to the plaintiffs as follows:—

"We have also at the last moment persuaded Mr. Chatterbhuj Khimji to withdraw his limit on cloves, which he hereby does, and leaves the same in your hands to sell 200 packages out of 435 packages, at the best market rate, either retail or wholesale, but not under 7½d. per lb. and as soon as you have sold the 200 please cable us the price, and we will then try to leave the remaining to your good discretion. You know very well that he will be a great loser in this transaction, and the same were only not sold to arrive, for a difference of ½ per lb. and your Mr. Williams gave him solemn promise to obtain the contended price; but unfortunately as the market has gone so very low, please try to mitigate the loss by selling them retail at the above price. Kindly, therefore, try your utmost to obtain the above prices even ½d. lower, but please don't sell the above 200 under 7½ per lb., and we are fully convinced you will secure the above prices."

On the 25th June 1890, the defendant wrote again expressing regret to hear of further fall of cloves, and saying "after trying very much, and persuading Mr. Chatterbhuj to accept lower rate, we have no other resource left but to wait for some time more for a better opportunity. Save and except this parcel of cloves and gum arabic we hereby withdraw all limits on our shipments now

in your hands, and leave them entirely at your good discretion, and to dispose of them at the best market prices."

On the 23rd August 1889, the plaintiffs addressed the following letter to the defendant threatening for the first time to sell the cloves :—

"We have no letter from you by mail 30th July, which greatly surprises us, as we fully expected, according to your promise, a considerable remittance to keep your account square. We, therefore, enclose *pro forma* account sales of all the produce unsold by reason of your over limits, calculated at the selling value of to-day, also a *pro forma* account current, which will give you a correct view of the state of affairs, viz., a deficiency of £883-12-9. As we have all this sum lying idle we have drawn the following drafts on you, say Rs. 5,976-10-6, exchange 1s. 4 1/16d., £400-0-3, in favour Chartered Bank; Rs. 5,976-1-6, exchange 1s. 4 1/16d., £400-0-3, in favour New Oriental Bank, which please do the needful with and pay at maturity. We have been very patient in allowing the above large balance to remain in your hands so long, as we could have turned it over many times to our great advantage, and we have only to add that if you refuse to pay we shall at once sell all the goods at best price obtainable.

"Yours, &c.

"(Signed) THOMAS D. CHARLESWORTH."

[529] "P. S.—We have your favour of 6th instant without any remittance which we cannot understand, as you must know, as well as we do, the state of your account, which you promised to keep in order. We note you withdraw limits on all goods except cloves, and as the whole of the large deficiency is entirely caused by the shipment of 435 bales cloves *ex* 'Clan Sinclair' you will please take notice that, if you dishonour our drafts for £800, we shall proceed to sell the parcel forthwith."

To this letter the defendant sent the following reply refusing to accept the plaintiffs' bills, and warning them not to sell the cloves :—

"10th September 1889.

"Dear Sirs,—Your esteemed favour of the 23rd ultimo is duly to hand, but we are very much astonished to find two drafts, of £400 each, written by your kind selves upon us, which, as a matter of course, and which you fully expected, being quite unreasonable are not accepted, but refused.

"We had clearly written to you not to draw upon us, but whenever we will find any deficit in our consignments in your hands, we will at once remit, and we can assure you that calculating even the present declining prices the differences in the rates obtained by you much lower than the actual ruling rates in many instances, and the difference in charges (so very exorbitant), complaints for which have long been written to you, shortness in weights, as well as our return commission at 2 per cent., no material sum will be due by us; consequently it is out of common sense for us to accept the bills. We had so frequently requested you to forego your commission, and we will transfer all our goods to some other firm, but you would not accept our proposal, and have mercilessly sacrificed our constituents, who would all have left us had we not long ago discontinued business with you, and arranged with better people, with whom, we are happy to say, all our constituents are well pleased and satisfied, and there is no cause of any complaint. It is needless, therefore, to mention that through your own indifference and carelessness you have displeased, and through zeal and energy others have satisfied, all our constituents.

"Those that have totally (but fairly and justly) refused to pay your redrafts we have already mentioned to you, and you must rest assured that every penny we have to refund to them you shall have to pay. Whatever remonstrations and reproaches we have to hear we cannot describe, and that is all for your worthy selves.

"Let us also convince you that we are fully prepared with all the proofs required for our above statement as regards the loss in weights, differences in rates and extraordinary charges

"Hoping you will still try to satisfy those who have removed their limits and, placing confidence, have entrusted their goods to your kind discretion. Regarding the cloves account

Chatturbhuj Khimji, we have persuaded him to reduce the limits to 7d. per lb., which please note, and bear in mind that you shall be held responsible if you sell the same under the above limit.

"We remain, &c.

"(Signed) LUDHABHOY."

[530] Further correspondence passed between the parties. On the 31st October the defendant by telegraph lowered the limit of price to 6d., but the price had then fallen below that limit. On the 11th December 1889, the plaintiff, who had then come out to Bombay, wrote to the defendant as follows:—

"The only goods we now hold on your account are 435 bales cloves *ex* 'Clan Sinclair' on which there is a deficiency at present market values of about £1,300. You have repeatedly promised Mr. W. B. Charlesworth that you would settle this matter, but you have not done so, and we now inform you for the last time that unless you answer to-morrow (12th instant) we must cable instructions to our London house to sell without reserve."

The 435 bales of cloves were sold by auction by the plaintiffs on 5th February 1890—20 of them at 4½d. per lb. and 415 at 4¼d. Accounts were duly presented to the defendant, showing a balance due to the plaintiffs, in respect of the cloves, of £1,432-15. This sum was included in the amount (£1,512-15-11) above stated for which the suit was brought. In taking the accounts the Commissioner struck out certain items, and the amount reported by him as due to the plaintiff in March 1890, was £ 1,314-10.

The exceptions to the report filed by the defendant, as above stated, were argued in December 1891, before FARRAN, J.

Kirkpatrick and Russell appeared for the Plaintiffs:—As to the question arising with reference to the sale of the cloves they contended that the plaintiffs had accepted the consignment and advanced £2,100 upon the condition that they were kept in funds, and that as the defendant had broken the condition, the plaintiffs were justified in selling the cloves to repay the amount of their advance. They referred to *Brown v. McGran*, 14 Peters, 479 (American Rep.), and *Pothonier v. Dawson*, Holt. (N. P.), 383.

Badrudin Tyabji and Jardine appeared for the Defendant:—They contended that a factor had no power to sell against the orders of the principal, and they relied on *Smart v. Sandars*, 3 C. B., 380; S. C., 5 C. B., 895.

29th February 1892. FARRAN, J., (after allowing the first and second exceptions to a certain extent) continued:—

[531] The third objection is one of great importance to the parties and also to merchants generally. I shall state with some particularity the facts which give rise to it.

The plaintiffs are a firm of merchants and commission agents carrying on business in London. They have no branch firm or place of business in Bombay, though one of the partners in the firm occasionally visits this city. The defendant is a merchant residing and carrying on business in Bombay. Previous to the 7th of January 1889, the defendant had done consignment business with the plaintiffs. I cannot find evidence as to the exact terms upon which that business was carried on, or what was its exact nature, beyond this that it was of the same kind as that which was done subsequent to that date. In January 1889, the plaintiffs and the defendant contemplated doing business together on a larger scale, and the plaintiff W. Charlesworth, who was then in Bombay, addressed a letter to the defendant, dated the 7th January, embodying

the terms of an arrangement which they had come to. It was in the following words :—

"Dear Sir,—I have now the pleasure to re-state the arrangement verbally agreed upon between us in regard to the proposed increase in consignment business between our two houses. Briefly stated, the leading points are :—

"That you will act for us in influencing consignments of produce (cotton to be excepted) to our care.

"The business on this side to be worked entirely in your name, and you undertake to guarantee us free of all loss in connection with the said consignments, and you guarantee the payment of our redrafts, &c.

"It is distinctly understood that the entire business in Europe is to be confined to ourselves, the only exception being in such cases where a dispute may arise between us and any one of your consignors, in which event, should the latter so wish, and with the object of retaining that particular connection, the consignment in question may be entrusted to some other London house until the dispute may be settled.

"We on our part agree to a net commission and brokerage of $1\frac{1}{2}$ per cent. The only exception to this will be in the case of hides or any other goods on which the customary London [532] brokerage is 1 per cent, and in such instances our inclusive charge will be 2 per cent. for commission and brokerage.

"Awaiting your confirmation and agreement to the foregoing terms, and trusting that a large trade may arise between us to our mutual benefit, I am, dear sir, yours faithfully W. B. Charlesworth."

From this letter it will be observed that it relates exclusively to the terms made by the defendant as an influencer of consignments and the plaintiffs as those in whose favour such consignments are to be influenced. There is no reference in it as to the nature and extent of the advances which the plaintiffs undertake to make upon goods consigned to them by consignors, or to the terms upon which they will make advances, or to the rights which such advances, if and when made, confer upon the plaintiffs over the goods consigned to them. All this is left to depend upon the previous course of dealing between the parties, the custom of the trade (if any), and the general law merchant applicable to the case. Charlesworth says that it was verbally arranged between him and the defendant that drafts would be drawn on the plaintiffs against consignments, and that such drafts should have a margin of 20 per cent. between the amount of the draft and the value of the goods exclusive of charges; and that whenever there was a deficit arising from a fall the plaintiffs were to draw on the defendant. It is, however, nowhere specifically alleged that it was agreed that, in the event of there being such a deficit, the plaintiffs were to have a power of sale over the goods consigned to them irrespective of the wishes and directions of the consignors, except in so far as such agreement may be inferred from the correspondence. Upon that point also there is no evidence as to the custom of the trade between Bombay and London. The extent of the right is, so far as the evidence in this case is concerned, left to depend upon inference from the letters put in and the general law. The defendant admits the plaintiffs' right to draw upon him when a deficit arose, but says that such right did not accrue until the deficit amount to £1,000. This limitation on the plaintiffs' right to draw for a deficit put forward in the correspondence is not proved; and I think that it must, at all events, be taken that it was a term of the arrangement between the parties, whether [533] resting in the course of previous dealing or on direct contract, that the plaintiffs had the right to draw on the defendant when a deficit arose, and

consequently that the defendant was under obligation to honour the plaintiffs' drafts when so drawn.

On the 25th January 1889, the defendant consigned 435 packages of cloves to the plaintiffs in London and drew against such consignment a draft for £2,100 on the plaintiffs. The following is an extract from the defendant's letter notifying the consignment: "We have by the present mail consigned to your good care 435 packages of cloves.....per S. S. 'Clan Sinclair' and drawn against the same for £2,100. Please accept on presentation. The consignment of cloves is from our constituent, Mr. Chattrbhuj Khimji, but as we had advanced Rs. 30,000 to him since a month, we have shipped the same in our own nameWe are sure that you will try your utmost to fetch the highest prices. The cost is 9½d. per pound, but he expects more, and not to be sold under the above rate." The invoice of the cloves is Exhibit 89. The draft was apparently held by the Hongkong Bank.

On receipt of this letter and invoice the plaintiffs telegraphed to defendant: "Remit by cable £400 against overdraft against cloves per 'Clan Sinclair' 435 bales. Reply immediately." The defendant wired a reply on the 12th February: "I will remit you by the outgoing mail." On the same day a telegram was received by the plaintiffs purporting to come from Tharia Topan as follows:—"Accept Ludhabhoy's bills. I guarantee." These telegrams are explained by the plaintiffs' letter of 15th February. The following are extracts from it:—"435 bales cloves per 'Clan Sinclair' against which you drew £2,100. In doing so you appear to have made a considerable error in your calculations. Taking the cabled value at the time of shipment at 9d. and each bale at 134 lbs., net (a very outside net weight) will give a gross value of

...	£ 2,150
			Less charges, freights, &c.	325
				£ 1,825
			Margin as customary	200
				£ 1,625 "

[534] The letter then refers to the telegrams, and proceeds: "Of course we know that you cannot be responsible for fall in market.....but you appear to have overlooked entirely the loss of weight in the voyage, and the freight and charges. As pointed out by Mr. W. B. C., your business can only be done on terms named, provided we are kept in funds." It is then pointed out that on other consignments, independently of cloves, there was a deficit of £550, against which the plaintiffs had drawn on defendant for £300, and it is notified that the draft for £2,100 had been accepted. The defendant also wrote from Bombay on the 15th February referring to the telegrams, and adding: "We are very much surprised to receive such a telegram from you, especially when a clear understanding was made between us and your Mr. Williams at the time of the arrangement that whenever you find the deficit amounting to £1,000 you are to draw against us for the amount, while only a very short time has passed, and you have grown impatient as to keep our bill standing, and wiring us to 'remit, otherwise you will not accept the said bill' is.....astounding, but we thank you for giving us such a lesson. However, to bring an end to this unpleasant matter we have only to say that as there is no consignment by the present mail we will remit by documentary bill by the next and we would not have waited till the next mail, but how as you are safe enough for any deficit whatever, we have taken time. Hoping this will be sufficient...."

The plaintiffs wrote to Tharia Topan also on the 15th February about his own business, and added to the letter this paragraph: "On the 10th instant we received your telegram 'Accept Ludhabhoy's bills. I guarantee.' Our telegram to that friend, of whom we have a high opinion, was the outcome of ordinary business principle. There is a question raised in the case whether Tharia Topan authorized the sending of the telegram sent in his name." I may say at once that it appears to me that the plaintiffs never accepted the unasked for guarantee of Tharia Topan in lieu of the rights (if any) which they had over the goods consigned to them, and that even if the guarantee was given, which seems very questionable, it cannot affect the legal rights of the parties. The telegram was sent to induce the plaintiffs to accept the bill [535] without a cabled remittance of £400; I shall make no further reference to this alleged guarantee. On the 21st February the defendant sent a bill for £250 to the plaintiffs, and authorized them to place it to his general account, or to the deficit in cloves, as they might think proper. The letter adds: "We consider the amount to be sufficient to cover any deficiency in our overdrawn draft on the consignment of cloves *ex* 'Clan Sinclair' (for which you took alarm and cabled us to remit) even at the present low market. Besides, you also have our friend, Mr. Thariabhoy Topan, as guarantee. We have placed a limit of 9½*d.* on the said shipment, but on arrival, if you fail to obtain our limit, kindly wire the valuations, and consulting with our constituent, Mr. Chatturbhuj Khimji, we will send you a reply whether to hold or to sell the parcel. Please act accordingly, that is, if it is to be sold we will wire, but if it is otherwise we will not reply. Be pleased, then, to hold the same for some time. We have induced the shipper to lower the limit to 9¼*d.*"

On the 8th March the 435 bales cloves having arrived were reported on as dullish and mixed, and valued at 7½*d.* This was telegraphed to the defendant, and on the same day the plaintiffs wrote to the defendant explaining the state of the accounts, which showed a large deficit. This letter also repudiated the idea that the plaintiffs were to wait until the deficit amounted to £1,000 before drawing. The defendant on the 13th March telegraphed to plaintiffs: "Hold cloves; have mailed a remittance of £400." The plaintiffs understood this as in addition to the £250 advised in defendant's letter of 21st February and received before 15th March, and on the 15th March wrote that in conformity with the defendant's instructions they would hold the cloves, but they point out that they feared a decline in price. The defendant followed up his telegram of 13th March by letter of 15th March: "We have sent you a reply on the 13th that hold cloves, and we have mailed remittance of £400, which we do by the present opportunity: that is, enclosed two drafts for £360, but hold the parcel each and all, on which limits are placed, till further instructions. Let us also tell you that you received from us in all £960, and we may still regularly go on remitting from time to time as we think fit. But if even upon [536] this you are afraid of still more deficiencies, and are willing to discontinue business with us, foregoing your commission on all your unsold shipments in your hands, we are ready to have them transferred to our friends, Messrs. Heller and Weiss, of Mincing Lane. If you agree to this, please wire only 'Jafferbhoy' and we will at once wire our friends to take charge of all such shipments." On the 29th March the plaintiffs sent the defendant *pro forma* account sales to date, showing the probable deficiency in the cloves to be £760, against which the plaintiffs admit the receipt of £300 and purpose drawing in the residue according to the arrangement. The plaintiffs did not wire "Jafferbhoy" in reply to the defendant's letter of 15th March, and must, therefore, be taken to have refused the offer to hand over the unsold consignments to Heller and Weiss. The defendant on 5th April wrote as to that

this: "We expected a reply by wire that you were willing to have all our consignments entrusted to some other firm, but not having received it we think that you have thought proper to wait, which is the only remedy even left to us."

The above is the important part of the correspondence relating to the consignment of cloves, the terms upon which it was consigned, and the terms upon which the consignment is accepted. The proper inference to be drawn from it appears to me to be that the defendant consigned the cloves with a limit upon their sale of $9\frac{1}{2}d$, subsequently reduced to $9d$, and that the plaintiffs accepted the consignment with such limit imposed, upon the condition that they were kept in funds, if a deficit should occur, owing to a fall in the market, or other cause, between the value of the goods and the amount advanced against them, and that the defendant acquiesced in the plaintiffs' condition. What the plaintiffs' rights and remedies were to be if the condition were broken by the defendant, is not specifically set out.

In accordance with the views expressed by the plaintiffs the clove market fell with great rapidity. The defendant lowered the selling limit, but not to such an extent as to allow of a sale being effected. The defendant did not make up the deficit thus caused.

[537] On the 23rd August the plaintiffs wrote to defendant enclosing *pro forma* account sales of all the goods then in their hands, showing a deficiency of £883-12-9. For this they drew bills on the defendant for £800, and gave the defendant notice that, unless he accepted and paid them, they would proceed to sell the cloves at once. At this time the cloves were the only goods which the plaintiffs held subject to a limit. To this letter the defendant replied on the 10th September. He refused to pay the drafts on the ground that owing to the plaintiffs having sold goods below the ruling rates, their exorbitant rates on charges, the shortness of weight which they had allowed, and the return commission which they had to account for, no material sum would be found due from him to them. The letter closed with the following paragraph relating to the cloves:—"Regarding the cloves account of Chatturbhuj Khimji, we have persuaded him to reduce the limit to $7d$. per lb, which please note and bear in mind that you shall be held responsible if you sell the same under the above limit."

The correspondence about this time assumes a character of much bitterness. On the 28th October the plaintiffs wired to the defendant that they would sell the cloves at Wednesday market, unless he cabled them a margin of £800. In this telegram the market price is put at $5\frac{1}{2}d$. This was followed by a telegram on the 30th, sent to the defendant: "Limit or we can sell at $5\frac{1}{2}d$. If you wish us to continue holding your goods, cable a margin of £800, otherwise selling." The reply on the 31st was: "Limit for cloves $6d$." That limit was never afterwards reduced. The plaintiffs did not sell then. On the 15th November cloves had fallen to $5d$. The plaintiffs made out an account showing a deficit of £1,192-3-10 against the defendant. A telegram was sent the same day.

On receipt of the defendant's letter of 25th October 1889, Charlesworth came out to Bombay bringing the account of 15th November with him and reached Bombay on the 1st December and presented bills for the balance £1,192-3-10 to the defendant, which the latter refused. On the 5th December cloves were $5d$., but this was a nominal price. There were several interviews between the plaintiff and the defendant, the result of [538] which was that the defendant refused to do anything about the deficit on the cloves unless the plaintiffs allowed him £600 for alleged overcharges, &c. Cloves were still going down. The plaintiff Charlesworth waited some time hoping for a settlement.

On the 30th January 1890, Charlesworth wrote to the defendant informing him that he was in receipt of a telegram from London that his cloves were in course of being offered for sale by public auction, and that they would be sold on his account to the highest bidder. The cloves were accordingly sold, and realized 4½d. to 4¾d.

The defendant seeks to be credited with the price of the cloves at 6d. per lb., the lowest limit placed upon them. The difference amounts to £329-1-8. The question is, whether according to the terms upon which the plaintiffs did consignment business for the defendant, or according to the general law, the plaintiffs not being kept in funds to meet the deficit arising from the fall in the market, were justified in selling when they did below the defendant's limit, or are liable to defendant for having done so. It is quite clear that when they sold there was a large deficit which the defendant was under obligation to make up. The conclusion I have arrived at is that the plaintiffs claimed that right throughout, though at first not specifically, and that the defendant inferentially admitted it. The defendant's letters of the 15th March and of the 10th September appear to be open to no other construction. His answer to the plaintiffs' demand for margin is in the one case to send it; on the other to contend that the plaintiffs were really fully covered. From this I think that the fair inference arises that the business was conducted on that basis. It is natural that it should be so. The plaintiffs in London have no practical remedy against the defendant in Bombay personally. They advance their moneys on the security of the goods, and it would seem a strange mode of doing business if in a falling market the defendant could prevent the plaintiffs from realizing their security without making up the deficit occasioned by such a fall. I have already pointed out that the plaintiffs did not advance their money on those particular goods, and accept the [539] defendant's limit, except conditionally. That condition being broken, the plaintiffs' right to sell arose, according to the course of business, notwithstanding the 6d. limit imposed by the defendant.

The point, whether a foreign consignment agent or factor, to whom goods are consigned for sale and who accepts and pays bills drawn against such goods, can sell them below the limit placed upon them by the consignee when he is not kept in funds to meet a deficit caused by falling markets, is a question of some difficulty in the authorities. Story lays down the law very broadly. Story on Agency (9th Ed.), p. 443, para. 371. He says: "As a lien is, ordinarily, nothing more than a right of retainer of the property, the party cannot sell or dispose of the property... unless with the consent of the owner, either express or implied, from the nature and objects of the very transaction. Thus, for example, if goods are consigned to a factor for sale, and he makes advances upon them, he is, of course, invested with a right to sell them, and may out of the proceeds satisfy his lien, or use it by way of set off. Nay in certain cases where he has made advances as factor, it would seem to be clear that he may sell to repay those advances without the assent of the owner (*invito domino*), if the latter, after due notice of the intention to sell for the advances, does not repay the amount." The case of *Smart v. Sandars*, 3 C. B., 380; S. C. 5 C. B., 895, is not on all fours with the present. There the advances were made subsequent to the consignment, and it was admitted that such advances conferred a lien on the factor who made them. It was contended that they did more, (*viz.*) enlarged the factor's original power, and as a matter of law conferred upon him a right to sell *invito domino*. It was held that they did not. The distinction between that case and the case where consignment (*i. e.* the acceptance of the consignment) and the advance are concurrent, is pointed out by Channell Sergeant in his

reply at page 913 of the report in 5 C. B. Where such is the fact he admits, in effect, that he puts the case in the same position as that of pawnor and pawnee, and makes the principle laid down in *Pothomer v. Dawson*, Holt. (N. P.), 383, applicable. The distinction [540] is also taken by WILDE, C. J., in delivering the judgment of the Court at page 918 of the latter report (5 C. B.). On the other hand, *Brown v. McGran*, 14 Peters Rep., 479, (American Rep.), an American authority, in its facts very closely resembles the case before me, and is strong authority in favour of the right of the plaintiffs to sell under circumstances like the present. On the whole, I think, that the authorities warrant the inference that where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission, and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to his principal, although the latter may place a limit on their sale, and desire to hold them on, if the principal do not put his factor in funds to make up the deficit so caused. I must, therefore, disallow this exception.

The defendant appealed. The chief grounds of appeal were, first, that the defendant was not bound, and did not agree, to provide a margin to cover any deficit in respect of the consignment of cloves; second, that FARRAN, J., was wrong in holding that either by express or implied agreement or by law the plaintiffs had authority to sell the cloves without the authority or consent of the defendant.

Lang (Acting Advocate-General) and *Jardine*, for Appellant (Defendant):—The lower Court has by inference imported a term into the contract giving the plaintiffs a right to sell the goods consigned to them, unless they were kept in funds sufficient to cover any difference there might be between the amount drawn by the defendant against the goods and the value of the goods. There is no evidence of such an agreement. The general mercantile law does not permit a factor to sell against the wish of his principal—*Smith's Mercantile Law* (10th Ed.), p. 126; *Smart v. Sanders*, 3 C. B., 380; S. C. 5 C. B., 895. The law as laid down in *Story* is not English law: see *Story on Agency* (9th Ed.), para. 371 and note. If the law does not give the plaintiffs the right to sell, there is nothing in the [541] evidence from which we can gather any agreement that they should have such a right.

Macpherson and *Kirkpatrick*, for the Respondents (the Plaintiffs):—It is clear that the defendant agreed to keep the plaintiffs in funds. The plaintiffs only accepted the defendants' consignment on this condition. That condition was broken, and the defendant became largely indebted to the plaintiffs. The only remedy left to the plaintiffs living in England was to sell the goods in their hands. They claimed the right, and it was inferentially admitted by the defendant. The defendant in his letters does not deny the right to sell, but insists that there was no deficit to justify the sale. The goods were really a pledge in the plaintiffs' hands—*Murtunjoy v. Cockrane*, 10 M. I. A. at p. 247.

The following authorities were cited and commented on:—*De Cmas v. Prost*, 3 M. P. C. (N. S.), 158; *Brown v. McGran*, 14 Peters Rep., 479, (American Rep.); *Pothomer v. Dawson*, Holt. (N. P.), 383; *Story on Agency* (9th Ed.), para. 371 and note; *Story on Bailments*, 308, 310; *Coote on Mortgage* (Ed., 1884), p. 615; *Indian Contract Act* (IX of 1872), section 202, sections 148, 172, 176.

Sargent, C. J.:—The question in this appeal arises in taking the account between the parties to a consignment for sale of 435 packages of cloves by the defendant, who is a merchant in Bombay, to the plaintiffs, who are a firm of merchants and commission agents in London.

The defendant had done consignment business with the plaintiffs previous to the 7th January 1889, on which day the plaintiff Charlesworth, who was then in Bombay, wrote to the defendant a letter, the object of which was to state the result of a verbal arrangement come to between the parties with a view to the increase of the consignment business, and was in the following terms:—(His Lordship read the letter *supra*, pp. 522, 523.) This letter, it is to be observed, is silent on the subject of 'advances to be made by the plaintiffs on consignments, and it is, therefore, to be inferred that in that respect the consignment business was to be carried on as it had been previously to the [542] new arrangement. There is no documentary evidence in the case as to what had been the course of business between the parties on this subject, and it has, therefore, to be gathered from the statements of the parties and the correspondence between them following upon the consignment in question. We may also add that there was no evidence as to any custom of the trade between Bombay and London; and the rights of the parties have, therefore, to be determined by the general principle of commercial law applicable to the case.

The general law applicable to commission agents as laid down in English authorities, on which the Courts of this country mainly rely in deciding commercial questions, was stated in *Smart v. Sandars*, 5 C. B., 895. In that case the advances were made subsequent to the consignment, and it was held that such advances conferred a lien on the factor for sale who made them, but that they did not confer upon him the right to sell, *invito domino*.

During the argument it was suggested that there might be a distinction between advances subsequent to and advances made contemporaneously with the acceptance of the consignment.

In *De Comas v. Prost*, 3 Moore P.C. (N. S.), 158 at p. 179, the Privy Council say that the doctrine of *Smart v. Sandars* is that "mere" advances made by a factor whether at the time of his employment as such or subsequently cannot have the effect of altering the revocable nature of the authorities to sell, unless there was an agreement, and in that case they held that the Court in Australia was right in granting a new trial moved for on behalf of the factor under the circumstances of the advances and the conversation and letters which preceded and followed them.

The result of these authorities is, I think, to show that where the factor for sale, who has made advances, claims the right to sell *invito domino*, the question is whether there was an agreement between the parties—either express or to be inferred from the general course of business or from the circumstances attending the particular consignment—that the factor should under any and what circumstances have the power to sell against the will of the owner of the goods, the *onus* of proving which lies [543] on the factor who has made the advances. Counsel for the respondent referred to section 202 of the Contract Act and illustration (b) accompanying it. But these assume that the factor has an interest in the goods expressly given him by the consignor at the time of the consignment and have no bearing on the present question.

Passing to the evidence I entirely agree with Mr. Justice FARRAN that the correspondence can leave no doubt that the plaintiff accepted the consignment in question with the restriction as to the minimum price at which the cloves were to be sold upon the understanding that they should be kept in funds by the defendant to meet any deficit arising from a falling market.

The market, it is not disputed, was a falling market from the date of the consignment, and the correspondence from first to last between the parties proceeds on the above assumption. The letters and telegrams are taken up with urgent demands by the plaintiffs for payments to cover the deficits, met

by objections on the part of the defendant which are directed exclusively to the amount of such deficits and to the unreasonableness of the plaintiffs in asking for further cover than the defendant had already furnished. The correspondence continues to be exclusively of this character until 23rd August, when the plaintiffs, apparently despairing of inducing the defendant to comply with their demands that he should square the account, threaten to sell the cloves "at the best price obtainable" if the defendant refuses to pay them a deficiency of £883-2-9. The defendant's answer of the 10th September to this letter is an important one and is in the following terms. (His Lordship read the letter: see *supra* page 529.)

It is to be remarked that throughout this letter the ground taken by the defendant is that the plaintiffs had not credited the defendant with the actual ruling rate, and that they had made exorbitant charges, and that, if the account were properly made out, "no material sum would be due from him," and it is on this ground alone that the defendant claims the right "to hold the plaintiffs responsible if they sell under 7d. per lb., the price to which he consents to reduce the limit. The plaintiff-[544]iffs did not sell, nor did they forego their commission and transfer their business to another house as proposed by the defendant. An acrimonious correspondence then commenced and continued until the beginning of the following year whilst the price of cloves was dull and declining, having gone down to 5½d. on 1st November. At last, on 28th October, the plaintiffs telegraph to the defendant that they would sell unless they cabled a margin of £800, stating that the market price put at 5½, and again, on 30th October, they telegraphed: "Limit if we can sell at 5½. If you wish us to continue holding, cable a margin of 800, otherwise selling." On the 31st defendant replies: "Limit for cloves 6d." On 15th November the price had fallen to 5d. and the plaintiffs telegraphed an account showing a deficit of £1,192-3-10. On the 15th December, Mr. Charlesworth having come out to Bombay informs the defendant he will telegraph to his firm to sell "at the best price obtainable" since he refuses to give them a margin to cover the heavy deficiency, and on 30th January 1890, informs the defendant that the goods were being sold on that day without reserve to the highest bidder.

Now, although no express admission by the defendant of the plaintiffs' right to sell in case of default of payment of deficiencies is to be found in the defendant's letters, they all tacitly proceed on the assumption that, according to the course of business between them, the plaintiffs would be justified in taking the course they threatened to take if the defendant committed default in remitting so as to cover any material amount of deficiency, and having regard to the nature of this business, which necessarily required that the factor for sale in England, who accepted the consignor's bills, should look mainly to the proceeds of the goods for payment of his advances, the inference from the above correspondence is, I think, that this consignment business was conducted between the parties on the basis of the plaintiffs being entitled to sell in a falling market if the consignor failed to cover the deficit, if exceeding 20%. The conclusion is strengthened by the conduct of the defendant, who never went into the witness box to deny that such was the course of business.

As no attempt has been made by the defendant, in taking the account, to show that there was not a material deficit at the [545]time the goods were sold, or that he was ready to meet it, I am of opinion that Mr. Justice FARRAN was right in holding that, under the circumstances disclosed by the evidence and according to the course of business, the plaintiffs' right to sell arose notwithstanding the 6d. limit imposed by the defendant, and that the exception to the Commissioner's report, which raises the question as to the defendant's

claim to be credited with the price of the cloves at 6d. per lb., was properly disallowed, and that the appeal should be dismissed with costs.

Starling J.: In this case the question to be decided is whether the plaintiff as consignee of certain produce was entitled to sell the same against the orders of the defendant, the consignor, in order to recoup himself the advances he made when he accepted the consignments. The cases of *Smart v. Sandars*, 3 C.B., 380; and 5 C.B., 895, taken together with *De Comas v. Prost*, 3 Moore's P.C. (N.S.), 158, decide that a factor, to whom goods have been delivered for sale, has no right to sell those goods against the orders of the owner in order to repay himself the amount he may have advanced upon them, whether the advance be made at the time the goods are handed to him or subsequently, unless it be proved that an agreement to that effect was made at the time of the advance, or may be inferred from the course of business between the parties. The case of *Brown v. McGran*, 14 Peters, 479, (American Rep.), and illustration (b) to section 202 of the Contract Act do not afford any assistance, as in the American case a general authority was given at the time of the advance being made, and the illustration assumes that such authority has been given, and it will be seen that no such authority was given in this case.

From the evidence it appears that previous to January 1889, the plaintiff and defendant had been doing business together, but the full details of the terms on which such business was carried on do not appear. At the beginning of that month some conversation took place between them as to an increase of business, &c. A letter was written by the plaintiff to the defendant referring to that conversation, but evidently containing only part of the terms on which such business was to be carried on. [546] On the 25th January 1889, the defendant consigned 435 packages of cloves to the plaintiff, and drew against them £2,100 and fixed the limit of price at which they were to be sold at 9½d. (that limit was eventually reduced to 5s). By the time the bill arrived in England, cloves had fallen in price, and the plaintiff refused to accept the bill unless cover was provided for the deficiency. That cover was provided by the defendant with very little demur, and the plaintiff accepted the bill, but with the knowledge that his orders did not permit him to sell under a certain limit. On this occasion the defendant by his acts showed that he was bound to keep the plaintiff guaranteed against any deficiency, and his letters of 15th February 1889, 15th March 1889, and 10th September 1889, distinctly show that he never alleged that he was not bound to remit cover whenever it was needed by the fall in the market, but all he does allege is that no cover was necessary at the time the letters were written. Clearly, then, the Court is justified in holding that this was part of the terms on which business was to be conducted between the defendant and the plaintiff. It is now admitted that the defendant did not remit sufficient cover in respect of this parcel of cloves. What, then, is the remedy which the plaintiff has in such a case? The plaintiff says that he was under the circumstances entitled to sell the cloves for the best price he could obtain, and in his letter of 23rd August 1889, he threatens to sell them unless margin is provided. The answer to that is contained in the defendant's letter of the 10th September, above referred to, in which no objection is taken to the power of the plaintiffs to sell under fitting circumstances, but it is alleged that those circumstances have no existence, as there would at that time be no deficiency.

On the 28th October sale was again threatened by telegram unless a remittance was sent, and the only reply the defendant made was to lower the limit to 6d. Sale was again threatened by the telegram of the 31st October and letter of 1st November, but these do not seem to have

been replied to. Early in November the plaintiff started for Bombay, and after his arrival the letters of 11th and 13th December were written to the defendant again threatening sale, and from the evidence of the [547] plaintiff it appears that the defendant never set up the case that the plaintiff could not, in any event, sell below the limit fixed, but adopted a policy of procrastination, alleging at first that he had not time to examine the accounts, and subsequently refusing to discuss the matter until the plaintiff settled some counter-claim he brought forward. If, according to the course of business, it was not open to the plaintiff under any circumstances to sell below the defendant's limit, that is the very first thing which would have been put forward by the defendant, but at no time does he allege that, and as he has refrained from tendering himself as a witness to prove such a condition, or to contradict the plaintiff when he says he had the right to sell if cover was not provided, the only inference that can be drawn is that, according to the established course of business between the plaintiff and the defendant, the plaintiff was entitled to sell the cloves at the best price he could obtain and against the wish of the defendant in the event of his not providing the plaintiff with sufficient cover as cloves fell in value. Consequently this appeal must fail.

Appeal dismissed.

Attorneys for the Appellant (defendant):—Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for the Respondents (plaintiffs):—Messrs. *Payne, Gilbert and Sayani.*

NOTES.

[See also (1896) 20 Mad., 97 at 101.]

[17 Bom. 547]

APPELLATE CIVIL.

The 15th August, 1892.

PRESENT :

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Aminabi and another.....(Original Plaintiffs) Appellants
versus

Sidu and another.....(Original Defendants) Respondents.*

Decree—Execution—Execution pending appeal—Landlord and tenant—Enhancement of rent—Decree for enhanced rent, and in default possession to be given—Appeal by defendants—Execution of decree by plaintiff—Possession taken pending appeal—Decree confirmed on appeal—Time for complying with decree not enlarged by filing appeal—Application by defendants to be restored to possession on payment of amount ordered by appellate decree—Practice—Procedure.

On the 13th February 1889, the plaintiffs obtained in the District Court of Satara a decree, on appeal, against the defendants, who were their tenants, ordering [548] them to pay Rs. 34 as the rent of certain land for the year 1882-83, and Rs. 50 a year as rent from the 5th April 1883, on which date the plaintiffs had given them notice of enhancement. In default of payment by the defendants the plaintiffs were to take possession of the land. The

* Second Appeal, No. 214 of 1892.

plaintiffs were to give the defendants credit for any sums which they had paid as rent since the year 1882-3.

Both parties appealed to the High Court from this decree. While these appeals were still pending, the plaintiffs on the 13th February 1890, applied for execution of the decree. They prayed for immediate possession and for Rs. 334 alleged to be the rent due under the decree, *viz.*, Rs. 34 for 1882-83 and Rs. 50 for each of the six years from 1883-84 to 1888-89 inclusive. The application was granted by the Subordinate Judge, and the plaintiffs obtained possession on the 19th February 1890.

On the 20th March 1890, the defendants applied to be restored to possession, stating that they had appealed to the High Court against the decree of the District Court, which had fixed their rent at the enhanced rate of Rs. 50, and that their appeal was still pending; that the sum of Rs. 334 was not due to the plaintiffs, inasmuch as they (the defendants) had continued to pay the rent at the old rate (*viz.*, Rs. 34) to the village officers together with the local fund cess Rs. 2-2-0, being a total of Rs. 36-2-0 for each of the six years. They contended that the plaintiffs were thus entitled only to Rs. 83-4-0, and not Rs. 334, and they claimed to get back the land on the ground that the plaintiffs had obtained possession on an illegal application.

While this application of the 20th March 1890 was still pending, the appeals against the District Court's decree of the 13th February 1889, came on for hearing before the High Court, which confirmed that decree on the 17th July 1890. Thereupon the defendants on the 1st August 1890, brought into Court Rs. 98 (being the difference between the old rent which they had paid and the enhanced rent payable under the confirmed decree) and applied to be restored to possession. On the 6th February 1891, the defendants' application of the 20th March 1890, came on for hearing, and was rejected by the Subordinate Judge on the ground that the defendants had not obeyed the District Court's decree. The defendants thereupon appealed to the District Court, which reversed that decision and ordered that possession should be given to the defendants on the ground that the time for payment of the amount due under the decree should be reckoned from the date of the confirmation of the decree by the High Court, *viz.*, 17th July 1890, and that by their payments made to the village officers and their payment into Court on the 1st August 1890, the defendants had obeyed the decree and were entitled to be put back into possession. The plaintiffs appealed to the High Court.

Held, (reversing the order of the District Court and restoring that of the Subordinate Judge), that the defendants could not recover possession. The fact that they had appealed to the High Court could not prevent the decree of the District Court from being executed, or enlarge the time for payment of the rent as decreed by that Court. No stay of execution was asked for, and all that the Subordinate Judge had to see in February 1890, was whether payment of rent had been made in accordance with the terms of the decree of the District Court made on the 13th February 1889. The defendants had not paid that rent when the [549] plaintiffs executed the decree on the 19th February 1890. The decree was legally executed before the High Court's decree was passed on the 17th July 1890, and that execution could not be afterwards cancelled, because of the High Court's decree. When the decree of the District Court was passed, the defendants should at once have paid to the village officers the balance of the rent due according to that decree, or, on the second appeal to the High Court being made, they should have applied for stay of execution. They followed neither course, and the decree was legally executed. The claim in the plaintiffs' application for execution may have been excessive, but the defendants had never attempted to pay anything beyond the old rent.

SECOND APPEAL from the order of J. W. Walker, District Judge of Satara, passed in execution of a decree.

The defendants were tenants of the plaintiffs at an annual rent of Rs. 34. On the 5th April 1883, the plaintiffs gave the defendants notice of enhancement of rent to Rs. 50. They afterwards sued the defendants claiming rent at Rs. 50.

the old rate up to the date of the notice of enhancement and at the higher rate for the period subsequent to the notice.

The suit came on appeal to the District Court, which, on the 13th February 1889, passed a decree for the plaintiffs, ordering the defendants to pay Rs. 34 as rent for the year 1882-83 and Rs. 50 per year as rent from the date of the plaintiffs' notice of 5th April 1883. In default of payment by the defendants, the plaintiffs were to take possession of the land. The plaintiffs were to give the defendants credit for any sum which they had paid as rent since the year 1882-83.

Both parties appealed from this decree to the High Court. On the 13th February 1890, while these appeals were pending, the plaintiffs applied for execution of the decree. They prayed for immediate possession of the land and for Rs. 334 alleged to be the amount of rent due under the decree, viz., Rs. 34 for 1882-83 and Rs. 50 for each of the six years from 1883-84 to 1888-89 inclusive. The application was granted by the Subordinate Judge, and possession of the land was given to the plaintiff on the 19th February 1890.

On the 20th March 1890, the defendants applied to be restored to possession. They stated that they had appealed to the High Court against the decree of the District Court, which fixed their rent at the enhanced rate of Rs. 50, and that their appeal was [550] still pending. They alleged that the sum of Rs. 334 was not due to the plaintiffs, as they (the defendants) had continued to pay the rent at the old rate, viz., Rs. 34, to the village officers together with the local fund cess Rs. 2-2-0, being a total of Rs. 36-2-0 for each of the six years. They had, therefore, paid a sum of Rs. 250-12-0 including Rs. 34 for the year 1882-83, and the plaintiffs were thus only entitled to Rs. 83-4-0 and not Rs. 334. They claimed to get back the land on the ground that the plaintiffs had obtained possession thereof with the crops standing thereon on an illegal application.

While this application of the 20th March 1890, was pending, the appeals against the decree of the 13th February 1889, came on before the High Court, which, on the 17th July 1890, confirmed the decree of the District Court. Thereupon the defendants on the 1st August 1890, brought into Court Rs. 98 (being the difference between the old rent which they had paid, and the enhanced rent payable under the decree confirmed by the High Court), and applied to be restored to possession.

On the 6th February 1891, the defendants' application of the 20th March 1890, came on for hearing, and was rejected by the Subordinate Judge, on the ground that the defendants had not obeyed the District Court's decree. The defendants appealed to the District Court, which reversed the decision of the lower Court and ordered that possession should be given to the defendants, on the ground that the time for payment of the amount due under the decree should be reckoned from the date of the confirmation of the decree by the High Court, viz., 17th July 1890, and that by their payments made to the village officers, and the sum paid into Court on 1st August 1890, the defendants had obeyed the decree and were entitled to be put back into possession.

• From this order the plaintiffs filed a second appeal to the High Court.

Manekshah J. Taleyarkhan for the Appellants (plaintiffs):—The defendants did not comply with the decree of the District Court within a year, and pay the rent as ordered, and accordingly the plaintiffs took out execution and obtained possession. The fact [551] that the defendants had appealed, did not enlarge the time allowed them for obeying the decree and paying the money. This is not a redemption decree—*Mahant Ishwargar v. Chudasama Manabhai*, I. L. R., 13 Bom., 106. When the defendants preferred their second appeal, they ought to have applied for stay of execution of the lower Court's decree, but instead of

doing that they, in defiance of the decree, deliberately waited till the disposal of their second appeal and then proposed to pay the amount due. The decree has been legally executed, and the defendants cannot cancel the execution, because of the subsequent decision in appeal.

Mahadeo Chimnaji Apte for the Respondents (defendants):—The only question here is whether the time allowed to the defendants for paying the enhanced rent should not be computed from the date of the High Court's decree. The cases show that where there is an appeal against a decree, the decree is suspended—*Daulat v. Bhukandas*, I. L. R., 11 Bom., 172; *Noor Ali v. Konu Meah*, I. L. R., 13 Cal., 13; *Sakharam Mahadev v. Hari Krishna*, I.L. R., 6 Bom., 113. The decree of the High Court being the final decree, it is that decree which ought to be executed, and not the decree of the District Court—*Shohrat Singh v. Bridgman*, I. L. R., 4 All., 376; *Muhammad Sulaiman Khan v. Muhammad Yar Khan*, I.L.R., 11 All., 267. Prior to the High Court's decree the plaintiffs had, no doubt, applied for execution of the District Court's decree, but that application and the order thereon were *ex parte*, and subsequently the defendants made an application under section 583 of the Civil Procedure Code (XIV of 1882). When a decree is executed pending appeal, the execution must be considered to be subject to the final order in the appeal. In this case the plaintiffs appealed as well as the defendants against the District Court's decree, but, although they appealed against it and while their appeal was pending, they applied for and obtained execution.

After the passing of the High Court's decree the defendants paid the amount of the enhanced rent into Court; the plaintiffs have taken it, and also recovered possession, which they ought not to have done.

[552] **Candy, J.**:—The plaintiffs in this case on 13th February 1889, obtained a decree of the District Judge that "defendants do pay to plaintiffs Rs 34 as rent for 1882-83, and Rs. 50 as annual rent from the date of plaintiffs' notice of 5th April 1883; in default of payment the plaintiffs are to take possession of the land from defendants; any sums which defendants have paid since the year 1882-83 as rent for the land are to be credited to them, and only the balance to be recovered by the plaintiffs."

On 13th February 1890, plaintiffs applied to the Subordinate Court to execute this decree by praying for immediate possession of the land, and for the rent due, which was given as Rs. 334. This sum was apparently arrived at by adding the rent for 1882-83 (Rs. 34) to the rent at Rs. 50 for six years, *viz.*, 1883-84 to 1888-89 inclusive. The defendants had all along continued to pay the old rent only (Rs. 34) through the village officers (section 85, Land Revenue Code, Bom. Act V of 1879).

The Subordinate Judge at once ordered immediate possession to be given to the plaintiffs, which was done on 19th February 1890.

On 20th March 1890, defendants made an application to the Subordinate Judge objecting to being ousted from possession, alleging that plaintiffs should have demanded Rs. 83-4-0 only, that they (defendants) had preferred a second appeal to the High Court against the decree of the District Court fixing the rent at Rs. 50; that credit should be given for the sums paid to the village officers, *i.e.*, Rs. 34 rent, and Rs. 2-2-0 local fund cess, total Rs. 36-2-0 each year; and demanding restoration of the land on the ground that plaintiffs had obtained possession with the crops on the strength of an illegal application. This application of the defendants was not finally disposed of by the Subordinate Judge till 6th February 1891.

In the meanwhile both parties had filed second appeals in the High Court against the District Court's decree, which, however, was confirmed on 17th July 1890, no written judgment being delivered.

Defendants then on 1st August 1890, made an application to the Subordinate Judge, producing Rs. 98, which they apparently [553] calculated as the difference (Rs. 14) for seven years between the rent confirmed by the High Court (Rs. 50) and what they had hitherto paid (put by defendants as Rs. 36). This of course was an error in calculation, for defendants apparently included local fund cess, whereas it is evident that the District Judge intended the Rs. 50 to be in place of the Rs. 34, exclusive of any local fund cess.

Eventually, as noted above, on 6th February 1891, the Subordinate Judge disposed of the defendants' application claiming to be restored to possession. He refused their prayer, holding that they had defaulted in complying with the terms of the decree.

On appeal to the District Court the Judge reversed the order of the Subordinate Judge, holding on the authority of *Patloji v. Ganu*, 1. L. R., 15 Bom., 370, that the time fixed for payment of the rent due must be reckoned from the date of the decree of the High Court: that defendants had since 1885-86 paid to the village officers Rs. 170 in addition to the Rs. 98 paid into Court; and that, therefore, defendants were entitled to be put back into possession.

We are unable to agree with the conclusions of the District Judge. There is apparently some mistake in regard to the case quoted by him. The ruling in *Patloji v. Ganu* is simply that the order of the High Court, allowing the withdrawal of a second appeal, is not a decree from which a fresh period can be computed for payment of redemption money. But there are expressions in the judgments of the learned Judges which tell strongly against the view taken by the District Judge. Thus PARSONS, J., said: "The mere fact that an appeal has been preferred does not stay execution of the decree appealed against, or prevent its being executed, or enlarge the time for its performance. . . . The plaintiffs have only themselves to blame if they did not within the prescribed time pay the money they were ordered to pay. They waited the result of the defendant's appeal at their own risk." So here: both plaintiffs and defendants appealed to the High Court: but that fact could not prevent the decree of the District Court being executed, or enlarge the time for payment of the rent as decreed by the District Court. Even if the Sub-[554]ordinate Judge had the power to enlarge the time for payment in the course of execution, the mere fact that an appeal had been lodged, would afford no special ground for enlarging the time (*Mahant Ishwargar v. Chudasama Manabhai*, 1 L. R., 13 Bom., 106, at page 109). No stay of execution was asked for: therefore all that the Subordinate Judge had to see in February 1890, was whether payment of rent had been made in accordance with the terms of the District Court's decree of the 13th February 1889.

The Subordinate Judge was wrong in supposing that nothing had been paid since 1882-83: strictly speaking the subsequent payments to the village officers were the only payments which the Courts could recognize. But assuming that the District Court's decree allowed, and could allow, payment either to the village officers or into Court, it is a fact that in February 1890, nothing had been paid beyond the old rent of Rs. 34, and not a pie in excess of that rent was tendered by defendants till August 1890. It is unnecessary, therefore, to enquire whether the District Judge in the present case was justified in assuming that, though the District Court's decree directed defendants to pay "Rs. 50 as annual rent from the date of plaintiffs' notice of 5th April 1883,"

yet defendants were justified in paying the old rent only (Rs. 34) for 1883-84 and 1884-85. In any case, defendants had not paid their due rent for 1885-86 to 1888-89 when the plaintiffs executed the decree. Nor did they tender it, or pay it to the village officers, when they objected (March 1890) to being ousted from possession.

Ought, then, the Subordinate Judge to have subsequently cancelled the execution of the decree, and restored the defendants to possession, because on 17th July 1890, the High Court confirmed the decree of the District Court, which directed defendants to pay the enhanced rent, and ordered that in default of payment the plaintiffs are to take possession of the land from defendants? We think not. It may be a hard case for defendants, but they have only themselves to blame. When the District Court's decree was passed, they should at once have paid to the village officers the balance of the rent due according to that decree, or they should, [555] on second appeal being made, have applied for stay of execution. They followed neither course, and the decree was, therefore, legally executed before the High Court's decision was passed. The claim in the plaintiffs' application for execution may have been excessive in regard to the amount of rent claimed; but the fact remains that defendants had never made any attempt to pay anything beyond the old rent. Under these circumstances, we must discharge the order of the District Judge and restore that of the Subordinate Judge. All costs on defendants.

Order discharged.

NOTES.

[The appellate decree was regarded as the starting point for limitation in (1914) 16 Bom. L. R., 778. See also (1893) 16 All., 65.]

[17 Bom. 555]

APPELLATE CIVIL.

The 18th August, 1892.

PRESENT:

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Balaji Ganesh.....(Original Plaintiff) Appellant
versus

Sakharam Parashram Angal and another... ..(Original
Defendants) Respondents.*

Instalments—Decree on mortgage for payment of Rs. 1,800 by instalments, and in default execution for whole amount to issue—Default in payment of instalments

—Waiver by plaintiff of right to execute decree—Receipt by plaintiff of overdue instalments is no waiver—Practice—Procedure—Different rulings of different High Courts—Judge to follow the ruling of the High Court to which he is subordinate.

By a consent decree passed in a mortgage suit the defendant was ordered to pay to the plaintiff the sum of Rs. 1,800 by yearly instalments of Rs. 50 payable on the 30th April in each year, and in case of default in payment of any instalment the plaintiff was to be at liberty to execute the decree by sale of the mortgaged property. The defendants failed to pay the first instalment, which fell due on the 30th April 1888, and the plaintiff applied for

* Second Appeal, No. 189 of 1892.

execution and obtained an order for the sale of the property. In order to prevent the sale the defendants on the 13th November 1888, paid Rs. 60 out of Court, and the application for execution thereupon was allowed to drop. The defendants subsequently made the following payments, *viz.*, Rs. 15 on the 5th June 1889, Rs. 25 on the 12th June 1889, Rs. 15 on the 1st January 1890, and Rs. 50 in the Nazir's office on the 2nd June 1890, which was the day on which the Court opened after the summer vacation, which had begun on the 30th April 1890. On the 6th June 1890, the plaintiff again applied for execution of the decree, which was granted by the Subordinate Judge. On appeal, the District Judge reversed the order, holding that the plaintiff by accepting the above payments had waived his right to execute the decree. On appeal to the High Court,

[556] *Held*, that the plaintiff was entitled to execution. The acceptance of the payments did not prove a waiver. They were not accepted on account of the specific instalments in arrears, but on account of the whole decree; and even if they were taken as payments of overdue instalments, they could not by themselves prove a waiver.

• A Judge should follow the ruling of the High Court of his own Presidency.

THIS was a second appeal from an order passed by J. W. Walker, District Judge of Satara, in an execution proceeding.

By a consent decree for Rs. 1,800 passed in a mortgage suit it was ordered (*inter alia*) that the defendants should pay off the amount by annual instalments of Rs. 50 to be paid on the 30th April every year, and on their failure to pay any of the instalments within the stipulated period, the plaintiff should recover the balance of the decretal amount by the sale of the mortgaged property and from the defendants personally.

The first instalment of Rs. 50 became due on the 30th April 1888, and the defendants having made default in payment, the plaintiff applied for the execution of the decree, and obtained an order for the sale of the property and payment of the whole amount. • In order to prevent the sale, the defendant on the 13th November 1888, paid Rs. 60 out of Court, and the application for execution thereupon dropped. The defendants made several subsequent payments, *viz.*, Rs. 15 on the 5th June 1889, Rs. 25 on the 12th June 1889, Rs. 15 on the 1st January 1890, and Rs. 50 in the Nazir's office on the 2nd June 1890, which was the day on which the Court re-opened after the summer vacation, which had begun on the 30th April 1890.

On the 6th June 1890, the plaintiff again applied for the execution of the decree and to recover the balance due under it by the sale of the mortgaged property and from the defendants personally.

The Subordinate Judge granted the application.

The defendants appealed, and the District Judge reversed the order. In his judgment he said :—

" This was a consent decree under which the judgment-debtor was required to pay instalments of Rs. 50 annually on the 30th [557] April, the first instalment being due on the 30th April 1888, and on failure to pay any instalment the whole amount became due. The first instalment was not paid on the due date, and the decree-holder applied for execution of the whole decree, and a sale of the property was ordered, but that order was set aside on an endorsement of the decree-holder that he had received Rs. 60. It is clear that the decree-holder has waived his right, and cannot claim to execute the whole decree as to the first default.

" The second instalment was also not paid on the proper date, but before the date of the third instalment the decree-holder received Rs. 55, or Rs 5 more than the amount of the overdue instalment, and gave a receipt. He did not make an application to execute the whole decree till after the date of the third instalment. According to the decision in *Hiralal v. Budho*, P. J., 1883,

p. 172, the receipt of the overdue instalment did not constitute a waiver; but the contrary has been held by the Calcutta High Court in a more recent case—*Ram Culpoo v. Ram Chunder*, I. L. R., 14 Cal., 352, and for the reasons there given, I think it must be held that there has been a waiver, as the decree-holder did, in fact, receive payment and did not apply for payment of the whole amount due.

"As to the third instalment, the Court was closed on the proper date for payment, and the judgment-debtor paid in the amount on the first day the Court re-opened. There has, therefore, been no default. As the judgment-debtor could not, as a fact, pay into Court the amount on the due date, he cannot be said to have made default in payment."

The plaintiff filed a second appeal.

Shamray Vithal for the Appellant (plaintiff):—It is admitted that there was default made in the payment of the first two instalments. The terms of the decree are peremptory, and empowers the plaintiff to recover the whole of the amount due under the decree if default be made in the payment of any instalment. There was no waiver by the plaintiff. When he made the first application for execution an order was passed directing execution of the decree by the sale of the mortgaged property. The defendants then [558] paid him Rs. 60 and suggested a compromise. The plaintiff thereupon acknowledged the receipt of Rs. 60 and applied to the Court to postpone the proceedings; but the Court, instead of postponing the proceedings, passed an order disposing of the *darkhast*. That was not a waiver—*Firm at Raver v. Sadashiv*, P. J., 1888, p. 381. The payment of Rs. 60 was made, not on account of the first instalment, but on account of the whole decree. This appears from the receipt given by the plaintiff. So also with regard to the other payments.

Mahadeo Chimnaji Apte, for the Respondents (defendants):—The very fact that the appellant received Rs. 60,—that is, Rs. 50 the amount of the first instalment plus Rs. 10—and allowed the *darkhast* to be struck off, shows that there was a waiver on his part. A man who does not enforce his right must be considered to have waived it—*Buddhu Lal v. Rakkhab Das*, I. L. R., 11 All., 482; *Nagappa v. Ismail*, I. L. R., 12 Mad., 192. There would have been no waiver on the appellant's part if he had declined to accept Rs. 60 and asked the Court to continue the proceedings. Waiver is an indulgence shown to the debtor, and having once shown it, the judgment-creditor cannot insist upon his right to have the whole decree executed. Although default was made in the payment of the first two instalments, the third instalment was paid into Court in time. The time for the payment of that instalment, no doubt, expired during the vacation, but as the plaintiff made the payment on the day the Court re-opened it was in time.

Candy, J. :—The District Judge was not justified in preferring the ruling of the Calcutta High Court to that of the High Court of his own Presidency. Where they differ he should follow the latter (see *Swamirao v. Kashinath*, I. L. R., 15 M., 419). He was also in error in remarking that the order for execution obtained by the decree-holder was set aside. The sum of Rs. 50 due as the first instalment was not paid, and so the decree-holder applied to execute the whole decree by the sale of defendant's property. To prevent that sale defendant paid Rs. 60 and the application for execution dropped, and was thus disposed of. The payment of [559] Rs. 60 was apparently on account of the whole decree, for at that time Rs. 50 only were due on account of the instalment. So, too, with the payments in 1889-90: long after the instalment of Rs. 50 was due (30th April 1889, defendant paid small sums amounting altogether to Rs. 55, which, as the receipts show, were paid on account of the sums due under the

decree. There is no mention in these receipts of the word instalment, which would have amounted to Rs. 50 only. The payment into Court by defendant of Rs. 50 on 2nd June 1890, could not affect plaintiff, who on 6th June 1890, applied to execute the balance of the whole sum due under the decree, after giving credit for part-payments.

It is admitted that there are no other facts but the above payments showing waiver on the part of the decree-holder. These, on the face of them, were not accepted on account of the specific instalments in arrears, as contradistinguished from part-payments on account of the whole debt; so they could not be sufficient evidence of a waiver—*Nagappa v. Ismail*, 1. L. R., 12 Mad, 192. And even if they be taken as payments of over-due instalments, they cannot by themselves prove waiver. This is the principle laid down in *Hiratal v. Budho*, P. J. for 1883, p. 172, which has been followed in subsequent cases—see *Firm at Raver v. Sadashiv*, P. J. for 1888, p. 381. As there are admittedly no other facts on which we could ask the District Judge to consider whether he found waiver or not, we must reverse his order and restore that of the Subordinate Judge. All costs on defendant.

Order reversed.

NOTES.

[Waiver is a question of fact and where proved, the right to execute the decree does not become barred:—(1902) 27 Bom., 1 F.B. See also (1903) 31 Cal., 83.]

[560] APPELLATE CIVIL.

The 31st August, 1892.

PRESENT:

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Sayad Shahu.....(Original Opponent) Appellant

versus

Hapija Begam.... (Original Applicant) Respondent.*

Minor—Guardian—Appointment of guardian by will—Application for certificate of guardianship—Practice—Procedure—Guardian and Wards Act VIII of 1890, Secs. 7 (Cl 3), 13 and 48†.

When a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under section 7 (3) of Act VIII of 1890 until it is found after due investigation that there is no valid will.

* Appeal No. 2 of 1892.

† Sections 7, 13 and 48 of Act VIII of 1890 are as follows:—

Section 7.—(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person, or property, or both, or

(b) declaring a person to be such a guardian,

the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

Section 13.—On the day fixed for the hearing of the application, or as soon after as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.

Section 48.—Save as provided by the last foregoing section and by section 622 of the Code of Civil Procedure, an order made under this Act shall be final, and shall not be liable to be construed by suit or otherwise.

The procedure under Act III of 1890 is not intended to be summary.

THIS was a first appeal from an order passed by C. G. W. Macpherson, District Judge of Belgaum.

The facts of the case were as follows :—

One Hapija Begam, widow of Gouskhan Desai, applied under Act VIII of 1890 for a certificate of guardianship to the persons of her minor sons and grandsons, and asked the Court to appoint a manager of the property of her deceased husband.

[561] The opponent, Sayad Shahu *alias* Mahomed Saheb, objected on the ground that he had been appointed guardian of the minors and of their property under a will made by the deceased Gouskhan on the 15th June 1890.

The District Judge after recording some evidence declined to take further evidence, on the ground that the proceedings were summary, and that it was open to the opponent to establish his position in a regular suit. He accordingly granted to the applicant the certificate of guardianship of the minor children, and requested the Collector to nominate a manager of the property.

The opponent appealed.

Phirozshah M. Mehta (with *Mahadeo Bhaskar Chaulbal*) for the Appellant:—The Judge has disposed of this matter summarily according to the procedure under Act XX of 1864; but that Act has been repealed by Act VIII of 1890, which contemplates full inquiry into the allegations of the contending parties—sections 13 and 48.

Section 7 (3) of the Act lays down that when a person is appointed guardian under a will or other instrument, no other person shall be appointed as guardian until the powers of the appointed guardian have ceased.

Jardine (with *Ghanasham N. Nadkarni*) for the Respondent:—The case of a guardian appointed under a will is governed by section 5 of Act VIII of 1890, and that section applies only to European British subjects.

Section 6 relates to the appointment of a guardian generally. But when a guardian is appointed under a will, section 5 only is applicable.

[CANDY, J., referred to section 7.]

We do not contend that the Act does not apply to persons other than European British subjects. We say that it applies to all persons, but what we contend is that when a guardian is appointed under a will, there is special provision made by section 5 which relates only to European British subjects. The other sections of the Act do relate to the appointment of a guardian, but they do not relate to the appointment of a guardian under a will or other instrument.

[562] Next, the Judge was not satisfied as to the genuineness of the will, and, therefore, he was right in not appointing the appellant. The Judge was also justified in rejecting the appellant's application for producing evidence, because the application was made only the day before the final order was passed.

The respondent is the grandmother of the minors, and, therefore, she is the proper person to be their guardian.

Candy, J. :—The District Judge was apparently misled by his recollection of the old Act (XX of 1864), which directed that the proceedings under that Act should be summary. Sections 13 and 48 of Act VIII of 1890 show that the procedure under the later Act is not intended to be summary.

Opponent opposed the application on the ground that he had been appointed by will. We think that under section 7 (3), the District Judge could not appoint any one else as guardian until he found, after due investigation, that

Goswami v. Goswami Shri Girdharlalji, see *infra*, p. 620), Mr. M. N. Nanavati, the Subordinate Judge of Poona, stated at the commencement of his judgment that he was greatly influenced by the decision of the Court of First Instance in the previous suit, confirmed as it was on appeal.

Now, the deposition of the plaintiff having been based purely upon political and administrative grounds, as was proved by the affidavits and exhibits annexed thereto, filed in *Shruman Goswami v. Goswami Shri Girdharlalji*, see *infra*, p. 620, this Court has no power or desire to enquire into the expediency or propriety of such action on the part of the Oodeypore Darbar. I may, however, remark that it appears, from the evidence given in the present suit, that the deposition and banishment of the plaintiff were not regarded with approval by many of the Vaishnavas, who [613] venerated the shrine of Shri Nathji and its occupant. The only witness called on behalf of the defendants at the recent hearing before me was Mr. Chutturbhuj Murarji, a well-known merchant in Bombay, and who belongs to the Vaishnava community. He stated, in cross-examination, that it was an unjust act removing the plaintiff from Nathdwara, and that he and the Vaishnava community still hold him in veneration.

An affidavit had been made by Mr. Chutturbhuj Murarji and others in Suit No. 218 of 1878, and on its being shown to him he said that the statements made in such affidavit were correct. The affidavit was put in evidence at the hearing and marked as Exhibit F. In paragraph 3 of that affidavit is the following passage:—"And we say that notwithstanding the forcible removal of the said defendant from Nathdwara, which most of the Vaishnavas, as we are informed and verily believe, consider to be most unjust, arbitrary, and unwarranted, they as well as almost all the followers of Shri Vullubhacharya, including the Gossains at Bombay, still pay the defendant the same respect and hold him in the same veneration as before his said removal, and, as we believe, still consider and treat him as the acharya or high-priest and entitled to their respect as the representative of Shri Vullubhacharya."

In the present case, it was argued on behalf of the second defendant that the plaintiff was only a trustee, and that, owing to the action of the Oodeypore State, he could no longer carry on the duties of a trustee. The same point was urged in the Poona case, but the High Court disposed of such contention by saying that, if the plaintiff was merely a trustee, he had not yet been removed from his office by any competent tribunal. I may here remark that at the time of the death of the two devisors in the present case, *i.e.*, on the 22nd September 1864, and 31st May 1873, the plaintiff was *de facto* as well as *de jure* in possession of the shrine and property of Shri Nathji, as he was not deposed and deported until the 8th May 1876. The learned Advocate-General suggested that the Poona case differed from the present one, as there the plaintiff had been in possession of the Poona property before his deposition and was in possession by his managers, the first four defendants in that suit. That no [614] doubt was so, but such fact formed no ground of the Court's decision, which was that the plaintiff, if regarded as the owner of the property at Poona, had not, in law, lost his right as such in consequence of the act of the Rana of Oodeypore, and that, if he was merely a trustee, he had not been removed from his office by any competent tribunal.

The main point raised in the present case in the written statements of the two defendants, *viz.*, that in regard to property of the shrine situate in the Presidency of Bombay the plaintiff's rights as Tikait Maharaja of the *gadi* of Shri Nathji had since his deposition in May 1876, been transferred to and vested in his son, was directly and substantially in issue in the two former suits.

between the plaintiff and his son, and was heard and finally decided by the High Court in each of them. I may here mention that the records of this Court show that after the decision of the Court of Appeal on the 2nd August 1879, see *infra*, p. 620, viz. on the 20th November 1879, Mr. Starling, counsel for the then plaintiff, moved before the late Mr. Justice GREEN to withdraw the suit with liberty to the plaintiff to bring a fresh suit for the same matter; and on hearing Mr. Latham counsel for the defendant, who opposed the same, the Court ordered that the plaintiff be, and he was thereby, permitted to withdraw from the suit, and it was further ordered that the plaintiff do pay to the defendant all his costs of the suit so far as the same had not been already ordered to be paid. No permission was given, under section 373 of the Civil Procedure Code then in force (Act X of 1877), to bring a fresh suit for the same subject-matter, and consequently he was by that section precluded from bringing a fresh suit for the same matter.

I will next consider the point raised by the fourth issue whether the said house has been validly bequeathed to the *gadi* of Shri Nathji. The will of Bhanji Bhimji, which was in the English language, executed on the 15th May 1858, more than six years before his death and attested by the late Mr. C. E. Stauger Leathes, a solicitor of the Supreme Court, and by his clerk, and interpreted by the late Narayan Dinnanathji, one of the principal interpreters of that Court, after (*inter alia*) directing that his funeral ceremonies should be performed by Sha Narotam Par- [615] manund, the son of his cousin, bequeathed his dwelling-house, the one in dispute, to his two wives Vajibai and Custur, *alias* Navibai, and to the survivor of them during their respective lives, with liberty to reside in it, receive the rents and profits thereof, and apply the same to their own use and benefit. He then says: "And I direct that from and after the decease of the survivor of them, my said wives, the said dwelling house and premises shall go to such person or persons as they, my said wives, shall by writing under their hands jointly appoint, or as the survivor of them shall by deed or will appoint. And in default of any such appointment I direct that the said house and premises shall be held by the heirs, executors, or administrators of the survivor of them, my said wives, upon and subject to the trusts aforesaid." The word "aforesaid" would seem to be a mistake for "hereinafter mentioned." The word "aforesaid" has, so far as I can discover, little if any meaning. Then follows a provision that after the death of the survivor of his wives "rents and profits of the house are to be paid and applied (after payment of expenses of repairing and the ground rent, assessment, and other bills thereof) to the *gadi* (or throne) of Shri Nathji for ever.

The widows do not appear to have made any joint appointment, survivor Custur, *alias* Navibai, by her will, dated the 4th January 1871, was also in English, and was attested by Mr. Joshe Crawford, then a partner in the firm of Messrs. Leathes and Crawford, and their clerk, and duly interpreted,

Power to allow plaintiff to withdraw with liberty to bring fresh suit.

* [Sec. 373:—If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff (a)

that the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or for the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.

If the plaintiff withdraw from the suit, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh suit for the same matter.

Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.]

disposed of the house in dispute in the following words:—"I give, devise, and bequeath the dwelling-house in which I now reside (describing it) unto the said Sha Tulsidas Premji, Sha Madhowdas Premji, and Sha Purbhudas Tulsidas, their heirs and assigns upon trust to let the same and collect and receive the monthly rents, issues and profits thereof, and to pay the same (after payment of all taxes and expenses in repairing or rebuilding the said premises) to the throne or *gadi* of Shri Nathji for ever, but I direct that it shall be lawful for my said trustees and trustee or the survivors or survivor of them or their or his heirs, legal personal representatives or assigns during their lives to reside in the first storey of the said house and premises hereinbefore lastly given and [616] devised free of rent." She then declares that the above-named persons are not to sell, mortgage, charge, or in any wise incumber the said hereditaments and premises. The will of Bhanji Bhimji give his two widows power to give the dwelling-house and promises to such person or persons as they should by writing under their hands jointly appoint, or as the survivor of them should by deed or will appoint. What Custur, the survivor of the two widows, did by her will was, in my opinion, in conformity with the power given her by her husband's will, and I, therefore, think that by the joint operation of those two wills the house, subject to the right of the three trustees to reside in the first storey, was validly bequeathed to the *gadi* of Shri Nathji. It was not denied that a devise of the income of an estate passes the fee—*Manuox v. Greener*, L. R., 14 Eq., 456. Such rule has been adopted in the Indian Succession Act (X of 1865), section 159, Illustration (c). "A bequeaths to B the rents of his lands at X. B is entitled to the lands."

in. Next as to right of the defendant Madhowdas Premji to reside in the house. It is suggested in paragraph 7 of the plaint that the direction in Custur's will, that it should be lawful for her three trustees or the survivor of them or their or his heirs, legal personal representatives or assigns during their lives to reside in the first storey of the house and premises free of rent, was *ultra vires* of the said Custur. As, however, in the events which happened, she had power under her husband's will to appoint by deed or will to any person or persons she thought fit, I think that the right to reside in the house is good during the lifetime of the three named persons and the survivor of them, and as Madhowdas Premji, the first defendant, is one of those three named persons, I think that he is entitled to reside during his life in the first storey of the house and premises rent free. I collect that the two other trustees are dead.

The operation and effect of a power of appointment in a Hindu will was considered in a recent case on the Original Side of this Court which came before the Court of Appeal (*Javerbai v. Kablibai*, I. L. R., 16 Bom., 492). There was a bequest to such person or persons as [617] the testator's brother Jamnadas should by deed or writing appoint. The learned Judge, who tried the suit, considered that it was impossible to find a place for power of appointment in the Hindu system of law (see p. 497). Sir CHARLES SARGENT, C. J., in delivering the judgment of the Appeal Court said (p. 497): "Put it remains to consider the more difficult question as to the validity and effect of such a devise, supposing the devise had been (as in the event it has become) to the ladies and the survivor of them, and after the death of the survivor of them to such person as Jamnadas should by deed or writing appoint. Such a devise has never, we believe, come under the consideration of any of the High Courts or of their Lordships of the Privy Council." Then after pointing out that the Hindu law recognizes the existence of "powers" over definite objects, as distinct from the ownership in them, such as powers of management, or *vahivat*, and the all-important power given to a widow to adopt, he proceeds: "There

are also other powers such as those which experience shows are frequently found in Hindu wills. Can it then be said that there is any general principle of Hindu law which forbids a testamentary power to appoint the person to succeed in a certain event being recognized and effect being given to it according to its terms? Such powers are undoubtedly of great convenience in practice, a consideration which it is to be remarked distinctly weighed with the Privy Council in *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick*, 9 Moo. Ind. Ap. at p 135. After the best consideration we have been able to give to the question, we have arrived at the conclusion that there is no clear principle of Hindu law which forbids our construing such a bequest as the one under consideration according to its plain and literal terms, subject, however—and this is of importance—to the same restrictions as the Hindu testamentary law imposes on the testator himself, viz., that the appointment should be made during the life of the tenant for life, so that the appointee may be ascertained when the event arises on which he is to take, and also that he should be a person who was alive at the death of the testator."

The three trustees of Custur's will, who are allowed by that will to reside in the first storey of the house in dispute during [618] their lives, are described in that will—Tulsidas Premji and Madhowdas Premji (the first defendant) as her brothers and Purbhudas Premji is described as her nephew. It was not suggested that they were not alive at the death of Bhanji Bhimji in September 1861. I am, therefore, of opinion that the plaintiff is entitled to possession of the house and premises in dispute, whether as owner or as trustee it is unnecessary to decide, subject to the right of the first defendant to reside in the first storey during his life.

Upon the issues raised I record the following findings:—On issue 1, I find that the plaintiff is the present owner and representative of the *gadi* of Nathji so far as regards the property claimed in this suit. On issue 2—That, subject to the point decided on the sixth issue, the plaintiff is entitled to the house claimed and the rents and profits thereof. On issue 3—That notwithstanding the fact that the plaintiff has been deposed from his position of holder of the *gadi*, and has been deported from Nathdwara, as in the written statement of the second defendant alleged, he is entitled to possession of the house claimed and to the rents and profits thereof, subject to the point decided on the sixth issue. On issue 4—That the said house has been validly bequeathed to the *gadi* of Shri Nathji. On issue 5—That, having regard to the circumstances in the written statement of the second defendant alleged, the plaintiff has a valid claim to the said house, or to the management thereof, subject to the right of the first defendant to reside in the first storey during his life. On issue 6—That under the terms of the wills in the plaint referred to, the first defendant has a legal right to reside during his life in the first storey only of the said house, free of rent, but not in any other part thereof. On issue 7—That the plaintiff has a right to eject him from all portions of the said house other than the first storey. On issue 8—That issue No 1 is *res judicata* so far as regards property of the *gadi* situate within the Presidency of Bombay. And I pass a decree for the plaintiff.

Declare that the plaintiff as the owner and representative of the shrine or *gadi* of Shri Nathji is entitled to the possession of the house claimed in the plaint, subject to the right of [619] Madhowdas Premji, the first defendant, to reside in the first storey thereof during his life, rent free. Order that the defendants do convey and make over to the plaintiff the said dwelling-house, other than the first storey thereof, and do and execute all acts, deeds, and assurances necessary for completely and effectually vesting the said house

and premises in the plaintiff and also hand over all title-deeds, documents, and papers in their or either of their possession, power or control relating to the said dwelling-house, such deeds and assurances in the case of dispute to be settled by the sitting Judge in Chambers Order that it be referred to the Commissioner of this Court to take an account of the rents and profits of the said house, other than the rents and profits of the first storey thereof, from the 31st May 1873, after deducting all necessary and proper outgoings, and that when so ascertained, the defendants, or whichever of them has received the same, do pay over the same to the plaintiff.

As to costs. The plaintiff denied the right of the first defendant to reside in the first storey of the house during his life and has failed on that point. The first defendant, in his written statement, denied the right of the plaintiff to any relief whatever and asked that the suit should be dismissed with costs. As each of those parties has partly won and partly lost, it seems, I think, fair that as between those parties each should bear his own costs of this suit. With regard to the second defendant the main point at issue between him and the plaintiff had previously been decided against him twice and was *res judicata*. I order that the second defendant do pay the plaintiff his (the plaintiff's) costs of this suit, including any costs reserved as between the plaintiff and the second defendant, and that the second defendant do bear his own costs thereof. Further directions and further costs reserved. Leave to all the parties to apply as advised.

Attorney for the Plaintiff:—Mr. Khanderao Moroji.

Attorneys for the first Defendant:—Messrs. Crawford, Burder & Co.

Attorneys for the second Defendant:—Messrs. Bhaishankar and Kanga.

NOTE:—

[620] ORIGINAL CIVIL

The 5th December, 1878.

PRESENT,

MR. JUSTICE BAYLEY.

Shriman Goswami Shri 108 Shri Govardhanlalji Girdharlalji.....Plaintiff
versus

Goswami Sūri Girdharlalji Govindraji.....Defendant.*

*Act of State of foreign power—Effect of such act on title to property outside foreign State—
Idol—Property of idol—High-priest and manager of shrine—Deposition of high-priest
by act of State—Appointment of new high-priest—Suit by latter for property
belonging to shrine.*

For thirty years prior to 1876 the defendant had been the high-priest of the shrine of Shri Nathji at Nathdwara in the territory of His Highness the Maharana of Oodeypore and as such was manager of the property of the shrine. This shrine is held in great veneration by the Vaishnava sect of Hindus, and large bequests and offerings of money, land, &c., are made to it by members of that sect. To facilitate the collection of such offerings and the employment of the funds belonging to the shrine, *padhis* or firms are established in various parts of India, including Bombay. The firm in Bombay was carried on under the name of Navnitdas Purshottam, and the house in which it was carried on was built with monies belonging to the shrine. On the 8th May 1876, by order of the Political Agent, of Meywar and the Maharana of Oodeypore he was deposed from that office for alleged misconduct and deported from Nathdwara. In his place his son, the plaintiff, was placed on the *gadi* as high-priest. In 1878 the plaintiff brought this suit praying for a declaration that as high-

Suit No. 218 of 1878.

priest of the shrine he was entitled to the property in Bombay belonging thereto, and for delivery of the same to him, and for an injunction against the defendant, and for a receiver, &c. He obtained a rule nisi calling on the defendant to show cause why he should not be restrained from receiving or dealing with the monies of the said firm of Navnitdas Purshottam and from tampering with the books, &c.

Held, discharging the rule, that the plaintiff had shown no title to the property in question. The defendant was in possession and had been for many years in possession of the property. His deposition by a foreign power and the election of the plaintiff to the *gadi* in the place of the defendant did not transfer the title to property in Bombay from the defendant to the plaintiff. As an act of State, it could not be made the basis of an action, and it could not be regarded as a foreign judgment.

THE plaintiff sued for a declaration that he was entitled to all the monies and moveable property of the firm of Navnitdas Purshottam, which carried on business in Bhoiwada in Bombay.

The plaintiff was the son of the defendant, and he claimed the possession and management of the property in question in right of his being high-priest of the shrine of Shri Nathji at Nathdwara in Meywar, in the territory of His Highness the Maharana of Oodeypore.

The plaintiff alleged that the said shrine was held in general esteem and veneration by the Vaishnava sect of Hindus, and large bequests and presents of land, money and other things were made from time to time to the said shrine by members of that sect in various parts of India and the adjoining countries; and offerings, called *logas* and *bheyts*, were made by Hindus to the shrine. In order that the said *logas* and *bheyts* might be more easily collected and the said bequests and presents received and in order that the funds of the shrine might be properly [621] employed, *padhis* or firms were established in various parts of India including Bombay. The firm in Bombay was carried on under the name of Navnitdas Purshottam, and the house in which it was carried on was built with monies belonging to the shrine.

The plaintiff further alleged that up to the year 1876 the defendant had been the high-priest of the shrine and the manager of all the property attached to or belonging to it: that on the 8th May of that year the defendant was by order of the Political Agent of Meywar and the Rana of Oodeypore deposed from that office and deported from Nathdwara, and that the plaintiff (the son of the defendant) was then placed on the *gadi* of Nathdwara as high-priest in place of the defendant.

The plaintiff then took possession of the shrine and of its property and had been ever since recognized by the Vaishnava sect as high-priest, and had been duly acknowledged by the firm in Bombay as owner and master of the firm.

The plaintiff complained that the defendant had come to Bombay and had taken possession of the house in which the firm was carried on, and the monies, moveable property, books, papers, &c., of the firm, and had caused the books to be tampered with, &c. The plaintiff prayed for a declaration that he was entitled to the said property, and for delivery of the same to him, for an injunction against the defendant, and for a receiver, &c.

The defendant filed a written statement in which he alleged that he was the high-priest of the said shrine, and that as such he was the absolute owner and was entitled to the exclusive possession and management of all the property belonging to the shrine, and that the plaintiff had no title thereto.

The fifth and sixth paragraphs of the written statement were as follows:—

"5. The defendant believes that the plaintiff has not willingly brought this suit, but has been constrained to bring the same by the Darbar at Oodev-

pore aforesaid, who since the year 1876 have usurped, and still usurp, the conduct of all the affairs of the said shrine, including the custody of the treasury of the said shrine and the control of its finances.

"6. The Oodevpore Darbar acted in the manner described in the last preceding paragraph, because the defendant as such high-priest as aforesaid refused to acknowledge the temporal supremacy of the said Darbar in the territory of Nathdwara and to admit the right of the said Darbar to review and exercise appellate jurisdiction in the said territory, and the defendant will contend that he was justified in such refusal."

The plaintiff obtained a rule calling on defendant to show cause why he should not be restrained from receiving or dealing with the monies of the said firm and from tampering with the books, &c., and for receiver.

The rule came on for argument on the 5th December 1878, and the hearing lasted for eight days.

Latham, Macpherson and Inverarity, for Defendant, showed cause.

[622] They cited *Frankland v. McGusty*, 1 Knapp., 300; *The Tanjong case*, 7 Moo. Ind. Ap., 476, and 13 Moo. P. C. C., 22; Aitchison's Treatise, Vol. IV, p. 4 to 7—21; *Sree Brighhookunjee Maharaj v. Sree Gokoolotsaojee Maharaj*, 1 Borr., 202; Todd's Annals and Antiquities of Rajasthan, Vol. I, Chap. XIX, p. 474 (2nd Ed.); *Forester v. Secretary of State*, 12 Beng. L. R., 120; *Raja Sahgaram v. Secretary of State*, 12 Beng. L. R., 167; *C. Istrie v. Imrie*, L. R., 4 H. L., 414; *Godard v. Gray*, L. R., 6 Q. B., 139; *Copin v. Adamson*, L. R., 9 Ex., 345, and on appeal, 1 Ex. D., 17; *Meyer v. Kallit*, I. C. P. D., 358; *Messina v. Petrococcino*, 8 Moo. P. C. C. (N. S.), 375.

Gill, Starling and Telang, for Plaintiff, in support of the rule.

They referred to *Talbot v. Hope Scott*, 4 Kay & Johnson, 139; *Sardar Bhagwan Singh v. Secretary of State for India*, L. R., 2 Ind. Ap., 43; *Ladkwarbai v. Ghool Shri Sarsangji*, 7 Bom. H. C. Rep., 150 (O. C. J.); *Forester v. Secretary of State*, 12 Beng. L. R., 120; Aitchison's Treatise, Vol. III, p. 10; Todd's Annals, &c., of Rajasthan, Vol. I, (3rd Ed.), p. 474, Vattel, p. 2, sec. 4; Wheaton's International Law, secs. 20, 21, 23.

Cur. adv. vult.

29th April 1879. **Bayley, J.** :—In this case the plaintiff, who is now seventeen years of age, alleges that he is high-priest of the shrine of Shri Nathji at Nathdwara and as such claims to be entitled to all the property dedicated to the shrine.

From the affidavits it appears that the shrine is in receipt of an annual revenue, arising from rents and offerings and other sources, of upwards of seven lakhs of rupees, and that the daily expenses incurred in connection with the maintenance of the shrine and the worship there is about Rs. 2,000.

The defendant is the father of the plaintiff, and until the year 1876 he had been upon the *gadi* as high-priest of the shrine and the manager of all its property.

It appears that the office of high-priest is hereditary, and that the defendant occupied the position for thirty years. The affidavits show that he is a lineal descendant (through the eldest branch of the family) of the person who in consequence of the persecution of the Emperor Aurangzebe fled to Rajputana, settled there, and ultimately founded at Nathdwara the shrine in question, placing in it the most sacred of all the images worshipped by the numerous and influential sect of Vaishnavas or Vallabha-Charyas.

* NOTE.—The judgment delivered was not written. This report has been prepared from notes taken.

On the 8th May 1876, the defendant for some alleged misconduct was deposed and deported from Nathdwara by order of the Political Agent of Meywar and of the Rana of Oodeypore. The plaintiff, his son, was then placed upon the *gadi* and as high-priest took possession of the shrine, and as such has ever since been recognized by the Vaishnava sect. A copy of the certificate of Colonel Impey, the Political Agent at Meywar, was annexed to one of the affidavits, and is as follows:—

[623] "This is to certify that Girdharilalji was deposed from the office of the high-priest Maharaj of Nathdwara shrine in Meywar by the order of the Political Agent and the Darbar on the 8th day of May 1876, and was deported from Nathdwara, and that Govardhanlal, son of the said Girdharilalji, was placed on the *gadi* of Nathdwara as the high-priest of the shrine, to enjoy all the revenue and emoluments pertaining thereto in the room of his father, the said *ex*-Maharaja Gosayee Girdharilalji, and is now Maharaja of Nathdwara."

It is to be presumed that the authorities of the State of Oodeypore considered that the conduct of the defendant justified his deposition. They granted him, however, out of the revenue of the shrine an allowance of Rs. 1,000 per *ensem*. Immediately upon the deposition of his father the officials placed the plaintiff upon the *gadi* as high-priest, and he has ever since held that position.

In the present suit the plaintiff seeks, as high-priest of the shrine, to recover property which is situate, not within the jurisdiction of the Darbar at Oodeypore, but in the town of Bombay and within the jurisdiction of this Court. The present rule *nisi* has been obtained by the plaintiff calling on the defendant to show cause why he should not be restrained from receiving or in any way dealing with the monies and the moveable property of the firm of Navnitdas Purshottamdas and from tampering with or altering the books of account and also why a receiver should not be appointed. It is of course clear that the plaintiff must show a title to the property which he claims, and that he is bound to the case which he has set forth in his plaint—*Eshenchunder Singh v. Shamachurn Bhutto*, 11 Moo. Ind. Ap., 7.

Two main questions have been discussed: first, whether the defendant's removal from the *gadi* was valid, and, secondly, whether that removal by order of the authorities of Oodeypore affected the title of the defendant to the property in Bombay, of which he had long been in possession, and operated in any way to transfer the title of that property from him to the plaintiff.

These two questions lead us to consider what was the *status* of the defendant as high-priest and what was his relation to the Oodeypore Darbar. (His Lordship referred to the history and character of the shrine as described in Todd's History of Rajputana and in the works of Horace Hayman Wilson, and continued:—) The Bombay property was attached to the office of high-priest of Shri Nathji, which had existed long before the foundation of the shrine at Nathdwara. The evidence before the Court shows that the defendant's position, his sacerdotal character and the singular reverence which is paid to him arise from his descent, and that he is regarded by his followers or at least by many of them as an incarnation of the Deity. The defendant states, and the affidavits appear to corroborate him, that he and his ancestors were originally independent of all interference and control by the Darbar of Oodeypore. This appears to have been the state of things up to the year 1826. (His Lordship then referred at length to the affidavits with reference to the cause of the defendant's deposition, and continued:—) The defendant was not deposed for misconduct, but because he claimed rights which were distasteful to the Darbar and to the Political Agent. He was really deposed because he would not acknowledge

the jurisdiction of the Darbar. I do not intend to give any opinion as to the legality or illegality of his deposition from the *gadi*, either regarding it as an act of State or [624] looking at it as analogous to a foreign judgment, because I consider that in any case the plaintiff is not entitled to have this rule made absolute. If it was an act of State, no authority has been cited to show that such an act can be the ground of an action in a Court of law or equity. In all the cases in which an act of State has been before the Court in India it has been the defendant who has set it up. The deposition cannot, in my opinion, be regarded as at all analogous to a foreign judgment. No Court has given any decision in the matter. We have only the decision of the Darbar, and as the dispute was one between the Darbar and the defendant, the Darbar assumed to be a judge in its own cause. Its decision, therefore, could not be regarded as analogous to a judgment. The case of *Godard v. Gray*, L. R., 6 Q. B., 139, sets forth the principles to be regarded by a Court in enforcing a foreign judgment.

The plaintiff having brought his suit in Bombay must take the law as he finds it, and he must show that by the law as administered in this Court he has a better title to the property which he claims than the defendant who is in possession. He has shown no equity to have the rule made absolute, and I cannot find from the affidavits or exhibits annexed to them that he has any right to the property in Bombay, which he can enforce against the defendant. The rule must be discharged with costs.

Rule discharged.

The plaintiff appealed against the above decision, but on the 2nd August 1879, the appeal was dismissed with costs by WESTROPP, C. J., and SARGENT, J., and the order of BAYLEY, J., confirmed.

Attorney for Plaintiff:—Mr. *Bhanshanker Nanabhai*

Attorneys for Defendant:—Messrs. *Kimington, Hore and Courroy.*

NOTES.

[See also (1913) 41 Cal., 19, (1895) 20 Bom., 495.]

[17 Bom. 624]

FULL BENCH.

The 21st July, 1892.

PRESENT :

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), MR. JUSTICE JARDINE
AND MR. JUSTICE CANDY.

Bai Kanku.....Petitioner.

versus

Shiva Toya.....Respondent.*

Divorce—Husband and wife—Decree based merely on admissions and without recording evidence—Adultery—Collusion—Practice—Procedure—Indian

Divorce Act (IV of 1869), Secs. 3, Cl. 3, 14 and 15.

A decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence.

* Reference, No. 17 of 1891.

THIS was a reference made by G. McCorkell, District Judge of Ahmedabad, under section 17 of the Indian Divorce Act (IV of 1869).

The plaintiff, Bai Kanku, a Christian resident of Shahivada in the Ahmedabad District, filed a suit against her husband, Shiva [625] Toya, under the provisions of the Indian Divorce Act (IV of 1869), to obtain a decree for dissolution of marriage on the ground of his adultery and desertion. The plaintiff alleged that she was legally married to the defendant on the 14th January 1875, that they had lived together as husband and wife for about ten years after the marriage, and that subsequently in 1886-87 the defendant eloped with a widow, and lived in adultery with her in a different village. The suit was filed in the year 1891.

The defendant, Shiva Toya, appeared and admitted the correctness of the allegations made against him in the plaint.

The plaintiff consequently did not produce any evidence on her behalf.

The District Judge pronounced a decree for dissolution of marriage, and forwarded it to the High Court for confirmation under section 17 of the Indian Divorce Act (IV of 1869).

Jardine, J. :—It is impossible to confirm this decree without violating the principles applied by the Courts to protect the bond of marriage. The decree is based entirely on admissions, no evidence having been recorded. To give the District Court jurisdiction there should have been some proof of the fact of the marriage—*Patrickson v. Patrickson*, L. R., 1 P., 36, and also that the petitioner is a Christian, and as to the residence under section 3, clause 3, of Act IV of 1869. The petition alleges adultery and desertion, but there is not even an averment that the desertion was an abandonment against the wish of the petitioner (see section 3, clause 9). It was, therefore, wrong of the District Court to decree dissolution of the marriage, especially as the essential facts have under section 14 to be shown to the satisfaction of the Court by evidence. To hold the adultery of the husband proved on his mere admission would, under the circumstances of the case, be imprudent and contrary to practice—*Williams v. Williams and Padfield*, L. R., 1 P., 20. The danger of collusion between the parties must always be borne in mind, and especially when, as in the present case, there has been a delay of several years in applying to the Court for relief—*Williams v. Williams*, 1. L. R., 3 Cal., 688.

[626] The case must be sent back to the District Court for further inquiry and evidence, as it lies on the petitioner to prove the marriage, the residence, and both the adultery and the desertion, and with reference to section 17 to explain the delay in bringing the suit. The result should be certified to the High Court within four months.

Order accordingly.

[17 Bom. 627]
CRIMINAL REFERENCE.

The 18th August, 1892.

PRESENT :

MR. JUSTICE JARDINE AND MR. JUSTICE TELANG.

Queen-Empress
versus
Bostan Valad Futtekhan.*

Indian Penal Code (Act XLV of 1860), Sec. 81 — Act likely to cause harm, done without a criminal intent and to prevent other harm.

The accused was a sepoy in a native infantry regiment. On the occasion of a fire in the city of Ahmednagar, he and the rest of his company turned out to assist in extinguishing it. He with other sepoys was stationed by their officer with orders to keep clear a space in front of the burning house, and not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, and on some of them coming round from the rear they were warned off by the sentries. A fracas between the soldiers and the police took place, and the chief constable was kicked by the accused. For this he was charged before the Magistrate, and fined for voluntarily causing hurt under section 323 of the Penal Code. In evidence it appeared that the police attempted to force the military guard, which had been posted as above stated, and it was further proved that the chief constable was not in uniform and that the accused did not know who he was. It was not alleged that the kick was unnecessarily violent.

Held, that the conviction was bad. The Magistrate having found that the chief constable was not in uniform, and that the accused did not know who he was, the kick was justifiable as given in good faith for the purpose of preventing much greater harm under section 81 of the Indian Penal Code, and as a means of acting up to the military order.

THIS was a reference under section 138 of the Code of Criminal Procedure (Act X of 1892) by the District Magistrate of Ahmednagar.

The reference was in the following terms --

"The accused are sepoys of the 8th Regiment Bombay Infantry. On the night of the 1st April 1892, a fire occurred in the city of Ahmednagar, and a company of the regiment turned out to assist in extinguishing it. The accused with other sepoys were [627] stationed by their officer with orders to keep clear a space in front of the burning house. The orders received by them through the lance naique were not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, and on some of them coming round from the rear to the front of the house they found themselves warned off by the sentries. A fracas between the soldiers and the police seems to have ensued, during which the chief constable is said to have received a kick from the accused Bostan.

"Rao Bahadur Moro Chintamon Joshi, First Class Magistrate, found the accused guilty of voluntarily causing hurt to the chief constable, and under section 323 of the Indian Penal Code sentenced him to pay a fine of Rs. 5.

"I think that Bostan committed no offence. The Court wrongly came to the conclusion that a sentry placed in the position in which the accused was placed is not justified in kicking any person whatever who attempts to force his guard. I am not prepared to say what a sentry may do under such circumstances; but I imagine that he is justified in using all reasonable force, and that the use

* Criminal Reference, No. 82 of 1892.

of the foot may under certain circumstances not be unreasonable. It is perfectly certain that the police did attempt to force the guard which had been set under the Adjutant's directions. It is further in evidence, and it was so found by the Magistrate, that the chief constable was not in uniform, and the accused had no knowledge as to who he was. It is not alleged that the kick was unnecessarily violent, or that it caused any damage, and it would appear to have amounted to just such a use of the foot as may have been necessary to repel an invader of the space which the sentries were guarding. It appears probable that had the party who met with the sentry's foot been a private individual, a prosecution would not have been instituted, or would have been unsuccessful if instituted. I am of opinion that the sentence should be reversed."

There was no appearance for the Crown or for the Accused.

Jardine, J.:—There is some discrepancy whether, as one witness says, the order to the soldiers was to prevent any person not in uniform going to the front of the house, or only to prevent any [628] person going there until they had ascertained that he was really on duty. We have no doubt that the order required the men of the military guard to give such access, to persons of civil authority as the law requires, they being under the same obligation to act in subordination to the civil authorities responsible, in time of peace, for the maintenance of the public order as other well-intentioned citizens who exercise their legal right of protecting the persons and property of other people from illegal violence. The case is not one to which Chapter 9 of the Code of Criminal Procedure (X of 1852) applies for the protection of the soldier, who, in dispersing an unlawful assembly, acts in obedience to an order which under military law he is bound to obey. It is unnecessary to consider the case of a soldier who, acting on such an order, obstructs a civil officer, *whom he knows to be such*, in the execution of his duty in ordinary times of quiet. In the present case there was no criminal intention, the kick was a mild and bloodless means of acting up to the military order, and it is found that the accused did not know who the chief constable was, and it is not found that he ought under all the circumstances to have guessed it. I have no doubt that, if the chief constable had not been an official, the soldier would, under our ordinary law, have committed no offence in obstructing and, if necessary, kicking him if he (the soldier) in good faith thought that the man forcing his way through the guard was, in so doing, removing the protection placed by the presence of the guard on the property. The kick would be justified under section 81 of the Penal Code (XLV of 1860) as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle that the man is excused by that section who in a great fire pulls down other people's houses to prevent the conflagration from spreading. As Bostan did not know the official character of the chief constable, and this ignorance was a mistake of fact, not of law, he must be dealt with as if the chief constable were an ordinary citizen; and the District Magistrate of Ahmednagar is right in his view of the law that the conviction and sentence are wrong. We now quash the conviction and sentence.

Conviction quashed.

[629] APPELLATE CIVIL

The 25th August, 1892

PRESENT:

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Ajibal Narasinha Hegde and another..... (Original Defendants) Appellants
versus

Shirekoli Timapa Hegde..... (Original Plaintiff) Respondent

Civil Procedure Code (XIV of 1882), Sec. 282—Order in attachment proceeding, effect of—Judgment-debtor not necessarily a party to the investigation under an attachment proceeding

The plaintiff obtained a decree. The defendants appealed. At the hearing of the appeal in the District Court a question was raised as to whether the defendants were not barred by limitation from denying the genuineness and validity of the lease and mortgage, they having failed to do so in certain execution proceedings which had taken place in 1890. It appeared that in execution of a decree against the father and the uncle of the defendants these lands had been attached. The plaintiff on that occasion had intervened, and set up his mortgage and lease which he produced. They were then held to be proved, and the lands were ordered to be sold subject to the plaintiff's mortgage. Upon these facts the District Judge held that by the attachment of their lands in these execution proceedings the defendants had been subrogated either to the cause of the decree-holder or to that of the plaintiff who intervened, and, therefore, they were parties "against whom the order was made." That order became conclusive against them within one year from its date, as they did not bring a suit to establish their right (art. 11, Schedule II, Limitation Act, 1877). It, therefore, confirmed the decree of the Court of First Instance.

On second appeal to the High Court,

Held, reversing the lower Court's decree, that the defendants were not necessarily to be regarded as parties against whom the order in the execution proceedings was made. Whether they were or not, depended on the facts of the case. The Court accordingly remanded the case that the District Judge might investigate the facts and pass a decree accordingly.

SECOND APPEAL from the decision of A. H. Unwin, District Judge of Kanara.†

This suit was instituted by the plaintiff to recover arrears of rent and interest thereon. He produced the counterpart of a lease upon which he based his claim.

The defendants pleaded (*inter alia*) that the counterpart of the lease sued upon was not genuine, and that it was given in connection with a fraudulent mortgage transaction effected by the plaintiff.

[630] The Subordinate Judge held that the counterpart was proved, and gave the plaintiff a decree.

On appeal by the defendants, the District Judge raised a question as to whether the defendants were barred from denying the genuineness and validity of the mortgage (Exhibit 49) and the counterpart of lease (Exhibit 68) relied on by the plaintiff. It appeared that the land in question had been attached in execution of a decree obtained against the father and uncle of the defendants in a suit in the Sirsi Court (No. 509 of 1878). The plaintiff had then intervened, alleging his mortgage and lease and producing the exhibits Nos. 49 and 68.

* Second Appeal, No. 461 of 1891.

† This case was once before the High Court on a different point: see I. L. R. 15 Bom., 297.

In the investigation then held, the Subordinate Judge found that the mortgage (Exhibit No. 49) was proved, and ordered that the attached lands should be sold subject to the plaintiff's mortgage. Upon these facts the District Judge observed, in giving his judgment in the present case: "It seems now to be urged, that the judgment-debtor defendants got no notice of, and were no parties to, this proceeding, and that the decision does not, therefore, bind them. This contention I believe to be utterly untenable. By the attachment of their lands, they must have had sufficient notice, and have been subrogated either to the cause of the decree-holder or to that of the intervening mortgagee in the subsequent proceeding 'as a party to the investigation of the claim': see *Netietom v. Tayanbarry*, 4 Mad. H. C. Rep., 472, and, therefore, defendants were 'as much a party against whom the order was made under the section (246 of Act VIII of 1859—283 of Act X of 1877, under which the Sirsi Court's order was passed) as their judgment-creditor.' That order became consequently conclusive against defendants after the lapse of one year from its date, 5th February 1890, without suit brought by them to establish their right clear of the intervenor's alleged mortgage and lease—article 11, Schedule II of the Limitation Act XV of 1877. They appear to have benefited, moreover, under the order by being left in physical possession of the lands."

The defendants preferred a second appeal.

Shamray Vithal for the Appellants.—The order in the execution proceeding cannot be held to be binding upon us, because we [631] were not parties to it—*Shivapa v. Dod Nagaya*, I. L. R. 11 Bom., 114; *Kedar Nath Chatterji v. Rakhal Das Chatterji*, I. L. R. 15 Cal., 674. The order then made cannot be held to have the effect of *res judicata*.

Narayan Ganesh Chandarankar for the Respondent.

Per CURIAM.—The District Judge, on the authority of *Netietom Perengaryprom v. Tayanbarry Parameshwaren*, 4 Mad. H. C. Rep., 472, has held that the order of the Court in the attachment proceedings is conclusive. But the authority of that case has been doubted, see *Shivapa v. Dod Nagaya*, I. L. R., 11 Bom., 114. *Kedar Nath Chatterji v. Rakhal Das Chatterji*, I. L. R., 15 Cal., 674. As was pointed out in the former of these two cases, a judgment-debtor cannot necessarily be regarded as having been a party to the investigation against whom the order was made, but it must depend upon the facts of each case.

We must, therefore, reverse the decree of the District Judge and remand the case, that he may investigate the facts and pass a decree accordingly. Costs to abide the result.

Decree reversed and case remanded.

NOTES.

[See also (1902) 25 Mad., 721.]

[17 Bom. 631]
APPELLATE CIVIL.

The 6th September, 1892.

PRESENT :

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Lalu Gagal.....(Original Plaintiff) Appellant

versus

Bai Motan Bibi.....(Original Defendant) Respondent.*

Landlord and tenant—Suit by tenant to recover possession claiming as full owner—Subsequent claim as yearly tenant unjustly dispossessed—

Notice to quit—Denial of landlord's title.

A plaintiff sued to recover possession of certain fields, &c., alleging that he was a permanent tenant of the defendant, having purchased the right of occupancy from previous occupants of the land. The lower Court held that the plaintiff's vendors were mere yearly tenants and not permanent tenants, but that the sale of their right to the plaintiff was valid, and that the plaintiff had been wrongfully dispossessed by the defendant, no notice to quit having been given. But

Held, that the plaintiff could not recover, inasmuch as his plaint and the conduct of his case amounted to a denial of his landlord's (defendant's) title. In his suit the plaintiff claimed to be full owner, and he could not afterwards claim [632] to be restored to possession on the ground that he was a yearly tenant entitled to notice to quit, which was not given.

Vithu v. Dhondi, 1 L. R., 15 Bom., 407, distinguished

SECOND APPEAL from the decision of E. M. H. Fulton, District Judge of Ahmedabad, in Appeal No. 333 of 1889.

The plaintiff sued to recover possession of certain fields and houses, alleging as follows :—

"In Thori Mubarak there is a field of 12 bighas which belonged to Bhala Rupa's occupancy, and was in his possession and enjoyment. He sold it to me for Rs. 50 by a registered deed dated 14th May 1886. The said field was made over to my possession. *Since then I have been full owner.* Besides, there are two houses near the chowra and four fields measuring about 64 bighas belonging by proprietary title to Ladha Mona. These he sold to me for Rs. 351 by a registered deed dated 19th May 1886, and put them into my possession

"Since then I have been *full owner* of altogether five fields and two houses. I began to cultivate the five fields through my servants, but the defendants obstructed me in July 1886, and neither allowed me to cultivate the fields or to occupy the houses. In July 1888, the defendants took possession of the property in dispute."

The defendant denied the plaintiff's right to recover, alleging that his (the plaintiff's) vendors were not owners of the property in suit, but were mere tenants holding under the defendant; that the sale was collusive and illegal, and that the plaintiff had no title to the property in dispute.

The Subordinate Judge held that the plaintiff's vendors were permanent tenants; that they had a right to transfer their occupancy rights by sale or mortgage, and that the sale to the plaintiff was valid. He, therefore, awarded the plaintiff's claim.

On appeal the District Judge found that the plaintiff's vendors were not permanent but yearly tenants; that the sale to the plaintiff was valid, and that

* Special Appeal, No. 522 of 1891.

he had been wrongfully dispossessed by the defendant. He held, however, that the plaintiff being a yearly tenant could only claim to be restored to possession by [633] alleging that he was a yearly tenant who had been dispossessed without notice from the defendant. The plaintiff, however, had not done this, but by his plaint and the conduct of his case wholly denied the defendant's (his landlord's) title. The District Judge said :—

"His plaint and the way in which his case has been conducted amounts to a denial of the lessor's title. He could only claim to be restored to possession by alleging that he was a yearly tenant who had been dispossessed without notice. He cannot come into Court, claiming a permanent tenancy, and on failure to establish that position be awarded possession and damages as a yearly tenant illegally dispossessed. The principles laid down in *Baba v. Vishvanath*, I. L. R., 8 Bom., 228, appear to govern this case. I have considered the case of *Purshotam Bapu v. Dattatraya*, I. L. R., 10 Bom., 669, and the decisions in printed judgments for 1880, p. 10 and p. 25 (*Kamachandra Appaji v. Dowlaji*; and *Hari Yamaji v. Ramabai*), but in all those cases the tenants were defendants, who were held entitled to set up alternative defences. Here the facts are different. The plaintiff comes into Court alleging himself to be 'owner,' which the subsequent conduct of the case shows was intended to mean permanent tenant, and the allegation on which his suit is based not being proved, his claim fails."

On these grounds the District Judge reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim.

Against this decision the plaintiff preferred a second appeal to the High Court.

Branson (with him *Ganpat Sudashiv Rao*) for Appellant (plaintiff) :—The plaintiff is entitled to recover possession. He was dispossessed by the defendant without notice to quit. It is true he claimed as permanent tenant, but the setting up of a permanent tenancy by the plaintiff does not amount to such a disclaimer of the landlord's title as to dispense with the necessity of a notice to quit to a tenant—*Kali Krishen v. Golam Ali*, I. L. R., 13 Cal., 3; *Kali Krishna v. Golam Ally*, I. L. R., 13 Cal., 248. In the present case, no notice to quit was given to the plaintiff, and he is, therefore [634] entitled to be restored to possession. The ruling in *Baba v. Vishvanath*, I. L. R., 8 Bom., 228, is dissented from in *Vithu v. Dhondt*, I. L. R., 15 Bom., 407.

Jardine (with him *Bhaishankar, Dinsha and Kunga*) for Respondents :—The plaintiff has sued as owner, and not as a yearly tenant, to recover possession of the lands in suit. In the plaint he does not even say that he is a permanent tenant entitled to hold as long as he pays the rent. That case he put forward at a very late stage of the suit. His whole conduct amounts to a denial of the landlord's title. He is, therefore, not entitled to any notice to quit.

Candy J. :—The District Judge held that the plaintiff "cannot come into Court claiming a permanent tenancy, and on failure to establish that position be awarded possession and damages as a yearly tenant illegally dispossessed. The principles laid down in *Baba v. Vishvanath Joshi*, I. L. R., 8 Bom., 228, appear to govern this case.... The allegation on which his suit is based not being proved, his claim fails."

It is contended that as *Baba v. Vishvanath*, I. L. R., 8 Bom., 228, has been dissented from in *Vithu v. Dhondt*, I. L. R., 15 Bom., 407, it follows that the plaintiff is entitled to recover possession as claimed. We are unable to accept that contention.

In *Baba v. Vishvanath*, I. L. R., 8 Bom., 228, the landlord sued in ejectment, asserting that he had given the defendant tenant a valid notice to quit. The

defendant among other things contended that he was a permanent tenant not liable to ejectment as long as he paid a fixed rent, and that the plaintiff had no right to give him any notice to quit. The Court held, quoting *Shahaba Khan v. Balya*, P. J. for 1873, p. 66, that "when the defendant did not admit a yearly tenancy, he could not claim the notice due only to a yearly tenant"; and, quoting *Vivian v. Moat*, L. R., 16 Ch., 730, and other English cases, "that setting up a right to hold at a customary rent in answer to a claim for increased rent is a repudiation of the landlord's title, which dispenses him from giving notice to quit."

In *Vithu v. Dhondi*, I. L. R., 15 Bom., 407, the plaintiff landlord sued in ejectment, asserting that he had given a valid notice to quit. Defendants [635] set up a plea of permanent tenancy, which the Lower Appellate Court held not proved. It was held by this Court that the notice alleged by the plaintiff was not in accordance with law, and that, therefore, there was no legal determination of the tenancy, and without such legal determination the plaintiff was not entitled to recover possession of the property from the tenant. Further, with reference to the two cases quoted above, it was pointed out that "in none of the cases relied upon in the judgment of the Court in *Baba v. Vishvanath* with the exception of the case of *Shahaba Khan v. Balya* had the disclaimer occurred subsequently to the filing of the plaintiff's suit. And as those cases were all decided in the English Courts, it may be desirable to point out that by English law [Woodfall's Landlord and Tenant, p. 78 (14th Ed.)], 'where a disclaimer is relied on, it must appear to have been made before or on the day mentioned in the writ of ejectment as the time when the claimant was entitled to possession,' and generally, 'in ejectment the plaintiff's title to actual possession must be shown to have accrued on or before the day on which possession is claimed in the writ (Cole on Ejectment, p. 288).' And if the legal effect of a disclaimer is a 'forfeiture' of the tenancy or 'a determination of the tenancy at the election of the landlord' (as to which the observations in *Purshotam v. Dattatraya*, I. L. R., 10 Bom., 669, and Woodfall's Landlord and Tenant, p. 376, are material) it would seem that such 'forfeiture' or 'determination' ought not, on general principles, to assist a plaintiff whose suit had been filed before it took place. It does not appear from the report of *Baba v. Vishvanath*, or from the judgment in *Shahaba Khan v. Balya*, that this distinction was mentioned in argument or was otherwise present to the mind of the Court." Further, with reference especially to *Baba v. Vishvanath*, it was pointed out that it may well be doubted whether a man's claiming to be a *mirasi* tenant ought of itself to be held to be a disclaimer of the landlord's title, and it was shown that the considerations urged by the Calcutta High Court in *Kali Kishen v. Golam Ali*, I. L. R., 13 Cal., 3, and *Kali Krishna v. Golam Ally*, I. L. R., 13 Cal., 248, and the remarks of this Court in *Haji Sayyad v. [636] Venkta*, P. J. for 1880, p. 122; see also I. L. R., 15 Bom., 514, foot-note (a), did not appear to have been brought to the notice of the Judges who decided *Baba v. Vishvanath*. It was, therefore, decided in *Vithu v. Dhondi* that that suit in ejectment could not be maintained.

Now in the present case the plaintiff is the purchaser from the tenants, and he brought his suit claiming to be "full owner," and complaining that the defendant landlord interfered with his possession. Defendant, among other things, pleaded that the plaintiff's vendors had no rights of ownership. The District Judge held that the plaintiff came into Court, alleging himself to be "owner," which the subsequent conduct of the case shows was intended to mean permanent tenant. No doubt, as the District Judge remarked, the plaint,

and the way in which the plaintiff's case was conducted, amounted to a denial of the lessor's title.

Can the plaintiff then, according to the principles laid down in *Vithu v. Dhondi*, claim to be restored to possession, and to be given damages, on the ground that as a yearly tenant he was entitled to a notice which was not given? We think not. In the cases quoted above the claims brought by the landlord plaintiff were founded on the alleged notices to quit, which were held to be invalid, and thus there had been no legal determination of the tenancies. The foundation of the claims failed. Here there could be no plea with regard to notice, for the form of the tenant's suit rendered such a plea wholly irrelevant. Accordingly no such plea was in fact put forward, and the question of the rights of the parties on the footing of the tenancy having been one from year to year was not raised or tried. Under these circumstances we hold that the ruling in *Vithu v. Dhondi* does not apply to the present case; and we confirm the decree of the District Judge with costs.

Decree confirmed.

NOTES.

[See also (1895) 20 Bom., 759.]

[637] APPELLATE CIVIL.

The 6th September, 1892.

PRESENT :

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Khusrubhai Nasarvanji.....(Original Plaintiff) Appellant

versus

Hormajsha Phirozsha.....(Original Defendant) Respondent.*

Administrator—Liability of, for loss to estate—Compromise of claim by administrator—Subsequent suit by a creditor of estate to set aside the compromise and for damages for negligence of administrator—Indian Succession Act (X of 1865), Secs. 280 and 328—Administrator's liability for neglect to get in any part of the deceased's property.

One Phirozsha Shapurji mortgaged certain property to Homjibhai Jamasji for Rs. 2,667. Homjibhai sued Phirozsha to recover the mortgage debt. Pending the suit Phirozsha died in 1878. Thereupon Hormajsha, the son of Phirozsha, took out letters of administration to the deceased's estate and contested Homjibhai's claim. Homjibhai obtained a decree in the Court of First Instance for the sale of the mortgaged property, and in execution of this decree the property was sold for Rs. 810 and purchased by Homjibhai. The decree was afterwards—viz. on 2nd August 1883—reversed, on appeal, by the Assistant Judge. Thereupon Homjibhai entered into a compromise with Hormajsha by which it was arranged that Hormajsha should give up his claim under the appellate decree of the Assistant Judge, to be repaid by Homjibhai the sum of Rs. 810 which he had realized by sale of the mortgaged property, and that Homjibhai should pay to Hormajsha Rs. 240 on account of his costs incurred in the suit and in taking out letters of administration. This compromise was effected on 16th November 1883.

In the meantime on 4th September 1883, the plaintiff had purchased from one Bai Bhikaiji an old decree which was outstanding against the estate of the deceased Phirozsha. On 10th September 1883, the plaintiff sought to execute this decree against the mortgaged

* Second Appeal, No. 876 of 1890.

property. Having failed in this attempt, the plaintiff filed a suit against Hormajsha for a declaration that the compromise of the 16th November 1883, had been fraudulently effected with the object of defeating his (the plaintiff's) claim, and to recover Rs. 1,000 as damages from the defendant on account of his fraudulent and negligent conduct as administrator of his deceased father's estate. This suit was dismissed by both the lower Courts, on the ground that as there were other creditors who had claims against the estate, the plaintiff's proper remedy was an administration suit, which would enable the Court to assess the claims of all the creditors.

Held, reversing the lower Court's decree, that the plaintiff was entitled to recover. By the compromise of the 16th November 1883, the defendant had given up his right under the Appellate Court's decree of the 2nd August 1883, to be repaid by Homjibhai the sum of Rs. 810 and had thereby occasioned a loss to the estate of that amount. He was, therefore, liable to the plaintiff to make good the amount under section 328* of the Indian Succession Act (X of 1865), subject, however, to a deduction, under section 280 of that Act, of the expenses incurred by him in obtaining letters of administration, and the costs of any judicial proceeding that might be necessary for administering the estate.

[638] THIS was a second appeal from the decision of C. G. W. Macpherson, District Judge of Surat, in Appeal No. 54 of 1888.

The facts of this case are fully stated in the head-note and in the judgment.

Lang (with him *Manekshah Jahangirshah*), for Appellant:—The defendant was administrator of the estate of his deceased father. As such he obtained a decree against one Homjibhai, but failed to execute it. He abandoned all his rights under the decree by entering into a compromise with Homjibhai. By so doing he occasioned a loss to the deceased's estate. He is, therefore, bound to make good the loss. See *Williams on Executors*, secs. 1806—11. See also section 328 of Act X of 1865. An executor or administrator has no authority to compromise or release a debt due to the estate. The compromise in the present case was in the nature of a release. It is, therefore, invalid and *ultra vires*. It is, moreover, fraudulent and collusive, made with the express object of defeating the plaintiff's claim. The suit in its present form will lie. There is no necessity of filing an administration suit. It is not shown that there are any other creditors of the estate whose claims are recoverable at law.

Kalabhai Lalubhai (with him *Ganpat Sadashiv Rao*), for Respondent:—The plaintiff's suit is one to recover damages from the defendant personally on the ground of fraud and negligence. Both the lower Courts have found that there was no fraud or negligence committed by the defendant. As regards any damage alleged to have been caused to the estate, the plaintiff has no *locus standi*, as he does not represent the estate. It is found that there are other creditors of the estate, and unless they all join in an administration suit, the claims of one creditor alone cannot be considered. The suit in its present form will not lie. Besides, it is wrong to attribute to the defendant any negligence in recovering any thing from Homjibhai. There was nothing to recover from Homjibhai. Homjibhai was already in possession as a mortgagee before he purchased the equity of redemption. This mortgage-debt was considerably more than the price at which he purchased the equity of redemption. The estate, therefore, suffered no loss by reason of the compromise.

[639] *Bayley, C. J.* (Acting):—On the 15th November 1886, the plaintiff filed his plaint in this suit against Hormajsha Phirozsha and Homjibhai Phirozsha to recover Rs. 1,000 as damages, which the plaintiff claimed in

For neglect to get in any part of the deceased's property.

* [Sec. 328:—When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.]

consequence of a certain settlement come to by the defendants on the 16th November 1883, in respect of a decree in Appeal No. 40 of 1883, which settlement, the plaintiff alleged, was fraudulently come to by the defendants in collusion with each other, with the object of defeating a claim which the plaintiff then had against the property of one Phirozsha Shapurji, the deceased father of the first defendant, to whose estate the first defendant had obtained letters of administration from the District Court of Surat.

After the filing of the suit the second defendant Homjibhai died, and the suit as against him being withdrawn proceeded against Hormajsha.

On the 13th September 1888, the Subordinate Judge at Surat rejected the claim and ordered the parties to bear their own costs. The plaintiff appealed, and on the 30th June 1890, the District Judge of Surat confirmed the decree of the lower Court, ordering each party to bear his own costs in appeal.

The District Judge in his judgment stated the facts of the case as follows :—

One Phirozsha Shapurji died in 1878 indebted, it was said, to the extent of Rs. 50,000, and Homjibhai (original second defendant), who had filed a suit for the recovery of a mortgage-debt prior to Phirozsha's death, applied to the District Court to issue letters of administration. The defendant Hormajsha, son of Phirozsha, at first refused to take out letters of administration, but finally did so, and contested Homjibhai's claim. Homjibhai was successful in the Court of the Subordinate Judge, but in appeal the decree was reversed on the 2nd August 1883, by the Assistant Judge at Surat. Meanwhile, and before the decree was reversed by the Assistant Judge, the mortgaged property, which seemed to have been Phirozsha's only assets, had been sold for Rs. 810 under the decree of the Subordinate Judge and purchased by the decree-holder Homjibhai, and the sale had been confirmed. After the decision of the appeal by the Assistant Judge, and before Homjibhai's time for appealing [640] to the High Court had expired, Homjibhai seems to have opened negotiations through Dr. Dosabhai, a mutual friend, with Hormajsha, with whom he was on bad terms, for the compromise of the matter, and after consultation with Mr. Ladkoba, a pleader, an agreement was arrived at, the terms of which were that Homjibhai should refrain from appealing to the High Court and should retain the mortgaged property, but should pay Hormajsha Rs. 240, the amount of his costs in the suit and in taking out letters of administration, as assessed by Mr. Ladkoba. This compromise, which was effected before the expiration of the time for appealing to the High Court, was duly certified.

The present plaintiff, however, had, after the Assistant Judge had reversed the Subordinate Judge's decree, purchased (on 4th September 1883) for Rs. 499 from one Bai Bhikaiji an old decree of 1878 for Rs. 2,171 and costs, obtained on the 27th March 1878, by her in Suit No. 43 of 1878 against Phirozsha Shapurji, the first defendant's father, which was still in force, and he endeavoured to execute this decree against the mortgaged property, i. e., the mortgaged property which Homjibhai had bought for Rs. 810 under the decree subsequently reversed by the Assistant Judge. At first the plaintiff applied, under section 234 of the Civil Procedure Code, for execution of the decree against the defendant Hormajsha as the legal representative of Phirozsha. The Subordinate Judge passed an order directing execution to issue against Hormajsha personally to the extent to Rs. 810. The District Judge reversed that order in appeal, and on second appeal to the High Court the decree of the District Court was confirmed with costs. The case in the High Court is reported in I. L. R., 11 Bom., 727. The High Court held that in section 234 of the Civil Procedure Code it is not provided that in an execution proceeding the representative shall be made answerable as well for what with diligence on his part would have

come to his hands as what actually has come to his hands, and that the Legislature did not intend to make him answerable in other cases except through the medium of a regular suit.

The plaintiff then brought the present suit, contending that the compromise was come to in order to defeat his claim, he and defendant being bitter enemies, and that he was thus deprived of [641] Rs. 810, which with interest would be fully Rs. 1,000, for which he contends the defendant Hormajsha is personally liable to him.

The District Judge states that the record shows that Phirozsha's estate had many other creditors. The Subordinate Judge at the close of his judgment says that the defendant had produced Exhibit No. 35 to show that the plaintiff is not the only decree-holder who has tried to execute his decree against the sum of Rs. 810 recovered by Homjibhai, but that he did not think it necessary to consider how far it assists the case of the defendant. We do not see that the District Judge has found or stated that there were any other decree-holders against the deceased Phirozsha or his estate.

Among the plaintiff's grounds of appeal to the District Court against the decision of the Subordinate Judge were the following:—That the lower Court erred in holding that the defendant was not bound to collect the debt of Rs. 810 due from Homjibhai; that the lower Court ought to have held that the compromise with Homjibhai was illegal and fraudulent, and made with a view to cause loss to plaintiff, and that it was not made in the interests of the estate of the deceased Phirozsha; and that the lower Court ought to have held that defendant intentionally failed to collect Rs. 810 due from Homjibhai and thereby prevented the execution of plaintiff's decree, thus rendering himself personally liable, and the lower Court ought, therefore, to have passed a decree as prayed for by plaintiff."

The District Judge ruled that the point for determination appeared to be, has plaintiff established his claim to the damages he asks for or to any portion of them? And he found such issue in the negative.

He says that the appellant asked that the issues annexed to the proceedings should be raised, the fourth of which was, as follows:—"Did Hormajsha as administrator neglect to get in any part of the property of the deceased and release a debt of Rs. 810 due to it by one Homjibhai? Did he unjustly and fraudulently release it? Is he personally liable for that debt to the plaintiff?" But the District Judge states that such issues did not appear to him to be necessary to the disposal of the appeal.

[642] We are unable to concur with the views entertained by the Subordinate Judge and the District Judge.

At the conclusion of the operative part of the agreement of compromise dated the 16th November 1883 (Exhibit No. 22), the defendant says: "I have given up my claim to the right which has accrued due to me under the decree of the Assistant Judge, in my favour, of taking back from Homjibhai the amount recovered by him (under the Subordinate Judge's decree)."

Section 278 of the Indian Succession Act (X of 1865), an Act binding on the defendant, who is a Parsi, and described in the plaint as residing in the Surat District, enacts that an administrator shall collect with reasonable diligence the property of the deceased and the debts which were due to him at the time of his death. By section 280 the expenses of obtaining letters of administration, including the costs incurred in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges. And by section 282 it is enacted that save as aforesaid no creditor is to have a right of priority over another by

reason that his debt is secured by an instrument under seal or on any other account, but the administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.

By section 327 when an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned. By section 328 when an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount. Illustration (a) to section 328 says: "The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount."

In *Nilkomul Shaw v. Reed*, 12 Beng. L. R., 287, it was decided by Sir R. COUCH, C. J., and AINSLIE, J., that where a person obtains a decree against an executor or administrator he is entitled to have his decree [643] satisfied out of the assets of the deceased, and that section 282 of the Indian Succession Act does not interfere with that right.

In *Remfry v. De Penning*, I. L. R., 10 Cal., 929, a decree for money had been obtained against a person who afterwards died intestate. Letters of administration to his estate were granted to the Administrator General of Bengal. The decree-holder applied for execution of his decree against the assets in the hands of the Administrator General. PIGOT, J., held that he was entitled to have his decree satisfied out of the assets of the deceased, although those assets were not sufficient to pay in full all the claims made against the estate. Mr. Justice PIGOT said that he must follow the course pursued in a case (unreported) cited in argument of *The Alliance Bank of Simla v. Hoff*, decided by Mr. Justice CUNNINGHAM in 1884, where execution was ordered to issue against the executor of a judgment-debtor for the full amount of the decree, though the testator's estate was not sufficient to pay all his debts.

In the first of the above cited cases Sir R. COUCH, C. J., said: "The provision in section 203, Act VIII of 1859, entitled the decree-holder to have his decree satisfied out of the property of the deceased or out of the property of the defendant, the executor, if it should appear that he had not duly applied the property of the deceased, and section 282 of the Indian Succession Act does not interfere with that right."

The two subsequent cases just cited appear to have been decided under or by analogy to the corresponding section 252 in the Civil Procedure Code, Act XIV of 1882, relating to a decree against the representative of a deceased person for money to be paid out of the deceased's property, which enacts that if no property of the deceased remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

[644] In each of those two cases the decrees had been obtained against the deceased debtor. Such was the procedure here, the decree in the Suit No. 43 of 1878, brought by Bai Bhikaiji against Phirozsha Shapurji, having been passed on the 27th March 1878, after the passing of which decree Phirozsha died, and his son, the defendant, then obtained letters of administration to his estate.

Now the defendant by compromising Homjibhai's claim on his mortgage (which at the time of such compromise had been held to be an unfounded one,

the Assistant Judge having decided that it had been paid), and by giving up [as stated in the agreement of compromise (Exhibit 22) dated the 16th November 1883], his claim to the right which had accrued due to him under the decree of the Assistant Judge in his favour of taking back from Homjibhai the amount recovered by him under the Subordinate Judge's decree, undoubtedly occasioned a loss to the estate by neglecting to get in that part of the property of the deceased, and by section 328, of the Succession Act "he is liable to make good the amount."

Had the property worth Rs. 810 been recovered by the defendant, as it ought to have been, it would have been available, wholly or in part, to be applied towards satisfaction of the plaintiff's decree. But having neglected to get in that portion of the estate of Phirozsha he is liable to the plaintiff to make good the amount.

The defendant is entitled under section 280 of the Succession Act (X of 1865) to first deduct the expenses of obtaining letters of administration, which, we think, were stated in the argument before us to have amounted to Rs. 100, and also the costs incurred by him in respect of any judicial proceedings that may be necessary for administering the estate, such costs being directed to be paid next after the funeral and death-bed charges. These costs can be ascertained in execution of the present decree. Taking the value of Phirozsha's property, which the defendant ought to have recovered, at Rs. 810, the balance, with six per cent. interest from the 16th November 1883, must be paid by defendant to plaintiff.

[645] The decree of the District Judge is reversed and a decree passed in favour of the plaintiff in accordance with the above remarks. All costs on defendant.

Decree reversed.

NOTES.

[See also (1904) 29 Bom., 96.]

[17 Bom. 645]

APPELLATE CIVIL.

The 23rd November, 1892.

PRESENT :

MR. JUSTICE FULTON AND MR. JUSTICE TELANG.

Ganpatram Jebhai.....(Original Plaintiff) Applicant

versus

Ranchhod Haribhai.....(Original Defendant) Opponent.*

Mamlatdar's Act (Bombay Act III of 1876)—Suit in a Mamlatdar's Court—Procedure where one of several plaintiffs in such a suit dies and the right to sue does not survive to the surviving plaintiffs—Code of Civil Procedure (Act XIV of 1882), Chapter XXI—Its applicability to a suit in a Mamlatdar's Court—Practice—Procedure.

The Bombay Mamlatdar's Act (III of 1876) makes no provision for the substitution of the names of heirs in the case of the death of one of the parties, and Chapter XXI of the Code of Civil Procedure (Act XIV of 1882) cannot be held to apply to proceedings in a Mamlatdar's Court. Accordingly where a possessory suit was filed by two persons in a Mamlatdar's Court, and one of them died pending the suit, and it appeared that the right to sue did not survive to the surviving plaintiff alone,

* Application under Extraordinary Jurisdiction, No. 136 of 1892.

Held that the Mamlatdar had no alternative but to dismiss the suit.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ganpatram Jebhai and Adesang Himdas filed a suit in the Mamlatdar's Court to recover possession of certain property, and while the suit was pending Adesang died.

On Ganpatram's application the case was adjourned for a fortnight to enable the heirs and legal representatives of the deceased plaintiff to be made parties to the suit.

As the deceased's heirs did not express their willingness to join as co-plaintiffs, the Mamlatdar rejected the plaint under section 13 of Act III of 1876, holding that in the absence of one of the plaintiffs the suit could not be proceeded with.

Thereupon the widow of the deceased Adesang applied to the Court, apparently under section 108 of the Code of Civil Procedure (XIV of 1882) to have the suit restored to the file. The Mamlatdar rejected this application, holding that he could not entertain it.

Against this order the present application was made to the High Court under its revisional jurisdiction.

A rule *nisi* was issued, calling upon the opponent to show cause why the Mamlatdar's order should not be set aside.

Goverdhan Madhavram Tripathi, for the Opponent, shewed cause:—The Mamlatdar's order is right. The Mamlatdar's Act (III of 1876) contains no provision for making the legal representatives of a deceased plaintiff a party to a suit. Nor is there any provision in that Act for restoring a suit to the file after it was dismissed for default. The provisions of the Civil Procedure Code relating to both these points do not apply. Bombay Act III of 1876 lays down a special procedure. And there is nothing in the Act to show that the Code of Civil Procedure is intended to govern cases for which the special procedure makes no provision—*Kasam Saheb v. Maruti*, I. L. R., 13 Bom., 552.

Gokuldas Kahandas Parikh, for the Applicant, in support of the rule:—It would be hard on a suitor in a Mamlatdar's Court if it were held that, on the death of a sole plaintiff or of one of several plaintiffs, the suit cannot be continued by the heirs of the deceased, merely because there is no specific provision in the Mamlatdar's Act for entering the names of the deceased's heirs on the record. In such a case the ordinary procedure laid down in Act XIV of 1882 ought to apply. Section 647 of the Code of Civil Procedure makes the provisions of the Code applicable to all judicial proceedings in any civil Court. And as the Mamlatdar's Court is a civil Court, Chapter XXI of the Code is applicable to suits in the Mamlatdar's Court. The Mamlatdar was, therefore, wrong in dismissing the suit on the death of one of the plaintiffs in this case.

Fulton, J.:—The purpose of the Mamlatdar's Act, as pointed out in the case of *Rasapa v. Lakshmapa*, P. J. for 1877, p. 58, being temporary only and chiefly to provide for the cultivation of the land and to [647] prevent breaches of the peace until the civil Court should determine the rights of the disputants, the procedure provided was of a very summary character. The Act makes no provision for the substitution of the names of heirs in the case of the death of one of the parties, and we are not prepared to say that Chapter XXI of the Civil Procedure Code is applicable. To hold that this chapter is applicable, and that the heir to a deceased party has a right to intervene at any time within six months from the date of such party's death, would introduce an element of delay which would be inconsistent with the summary

nature of the Act. In *Kasam Saheb v. Maruti*, I. L. R., 13 Bom., 552, the High Court held that section 328 and the following sections of the Civil Procedure Code were not applicable to proceedings under the Mamlatdar's Act, and the reasoning on which the decision was based seems to us to hold good equally in the case of Chapter XXI. Our attention was called to the case of *Nana Bayaji v. Pandurang Vasudev*, I. L. R., 9 Bom., 97, in which the remarks of another Division Bench appeared to lead to the conclusion that section 332 of the Code could be resorted to in such proceedings, but the point was not really before the Court for decision.

It may be urged that it is very anomalous that, after a suit has been duly instituted, no provision should exist for its continuance on the death of one of the parties; but it must be remembered that the object of Bombay Act III of 1876, as stated in the preamble, was to consolidate and amend the law relating to the powers and procedure of Mamlatdars' Courts, and that unless we were to hold that the Legislature had, in the sections of the Act itself, failed to carry out its purpose of consolidating the law relating to the procedure of Mamlatdars' Courts we could not accede to the argument that it was intended that the prescribed procedure should be supplemented on a variety of points by procedure borrowed from the Code. There is, however, no reason to impute to the Legislature any such failure of purpose. The main object in view being speedy and merely temporary relief it was probably thought inexpedient to make any provision for the continuance of a suit on the death of one of the [648] parties; inasmuch as to force an heir to intervene immediately on the occurrence of a death before he had had sufficient opportunity of ascertaining the extent of his rights might lead to permanent injustice, while to allow him six months to consider his position would defeat that object by protracting the proceedings. Although the sudden termination of a suit before the Mamlatdar consequent on the death of one of the parties might cause inconvenience to the surviving party, still that inconvenience would be merely of a temporary nature, inasmuch as it would remain open either to him or to the heirs to seek relief at any time in the ordinary civil Courts.

Under these circumstances we think that, so far as the second plaintiff's case was concerned, the Mamlatdar had no alternative but to dismiss it on his death.

As regards the first plaintiff, the Mamlatdar ought, no doubt, to have given his reasons for holding that the right of suit did not survive to him alone. But as it appears that the claim was one in which he did not allege a right to sole possession, and as it has not been suggested that the second plaintiff's interest passed entirely to him by survivorship, it is obvious that he was not competent to carry on the suit alone, and that, therefore, the Mamlatdar was right in dismissing it.

For the above reasons, we consider that this rule must be discharged with costs.

Rule discharged.

[17 Bom. 648]

ORIGINAL CIVIL.

The 22nd December, 1890.

PRESENT:

MR. JUSTICE BAYLEY AND MR. JUSTICE FARRAN.

Ranchordass Amthabhai.....(Original Plaintiff) Appellant
versus
 Maneklal Gordhandass.....(Original Defendant) Respondent.*

*Encroachment—Injunction—Highway—Place dedicated by owner
 of land for convenience of occupiers of adjoining houses—User
 of such open space—Covenant*or grant presumed—
 Easement—Right of way—Landlord and
 tenant—Variance between pleading
 and evidence—Practice --
 Procedure.*

The plaintiff and defendant occupied houses situated in the same lane and opposite each other. Close to both houses was an open space in which a cross had [649] stood. The plaintiff alleged that the said vacant space was originally intended for and had always been used by the occupants of his house and the residents in the lane in common for the purposes of recreation, save where the cross stood. The cross had been for many years visited by Christian worshippers who prayed and worshipped there. The plaintiff also alleged that, in addition to the general use of the open space, he and his predecessors in title and the occupants of his said house had for more than twenty years used the open space as a footway and a way for carriages and other vehicles to approach the said house and to stand and be able to turn there. He complained that the defendant had wrongfully removed the cross, and enclosed the greater portion of the said open space, and he prayed for a declaration that he and the occupants of his house were entitled to the use of the said space for purposes of recreation and as a footway and carriageway and for an injunction. The defendant pleaded that the whole of the open space formerly belonged to a Portuguese religious confraternity who were the *fazendars* of both of his property and the plaintiff's; that this confraternity had permitted the cross to be erected on the land, at which the residents of the houses of the plaintiff and defendant and other adjacent houses who were then Portuguese used to assemble and worship: that the Portuguese having left the locality the cross was removed, and the part of the open space which had been enclosed by the defendant had been sold to him by the confraternity in 1887. He denied the user of the space alleged by the plaintiff.

Held, that the evidence was not sufficient to establish that the land in dispute had been dedicated to the public, but that, on the evidence, the Court was justified in presuming and ought to presume a covenant on the part of the *fazendari* owners of the oart to keep the lane, including the upper end of it, open for the use of the owners of the houses abutting upon it. Such a covenant should be presumed equally in the case of a landowner giving land for building purposes to *fazendari* tenants on a perpetual tenure at a fixed rent and in the case of a owner selling land out and out for building purposes.

Where the plaintiff suing to prevent an encroachment on certain land alleged that the land was set apart for recreation, but the evidence established that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation purposes),

Held that the plaintiff ought not on that account to fail altogether and be left to a fresh action. The defendant had not been misled or induced to refrain from calling evidence to rebut the plaintiff's case.

* Suit, No. 93 of 1888. Appeal, No. 677.

THE plaintiff was the owner of a house situate in Portuguese Lane, Agiary Street, Kalbadevi Road, in Bombay. The defendant owned a house in the same lane and opposite the plaintiff's house.

The plaintiff alleged that to the west of his house, and to the south of the defendant's house, there had been for more than twenty years an open space in which stood a cross on a pedestal. The [650], vacant space measured 23 feet from north to south and from east to west about 23 feet at one end and 24 at the other.

The following paragraphs of the plaint set forth the plaintiff's case:—

"3. The said vacant space was originally intended for, and has always been used by the occupants of the plaintiff's said house and the residents in the said lane in common for purposes of recreation, save where the said cross was erected. The said cross has constantly been visited for very many years past by Christian worshippers, who have prayed and otherwise worshipped there.

"4. The plaintiff says that, in addition to the general use of the said open space, he and his predecessors in title and the occupants of their said house have, for many more than twenty years prior to the acts of the defendant complained of, enjoyed the use of the said open space as a footway and a way for carriages and other vehicles to approach the said house and to stand and be able to turn round there. The plaintiff says further that the water from his said house has been for many years past conducted through a drain under the said open space, which said drain is shown on the said plan and denoted as plaintiff's drain."

The plaintiff complained that the defendant had recently wrongfully removed the cross and enclosed the greater part of the open space by building walls, &c., thereon, leaving only a narrow passage on the east and west side of the said space. He prayed that it might be declared that he and the occupants of his house were entitled to the free and uninterrupted use of the said space for purposes of recreation and as a footway and carriageway, and for an injunction. He also prayed for a declaration of his right to drain water from his house through the drain referred to in the fourth paragraph of the plaint.

The defendant in his written statement alleged that the whole of the open space formerly belonged to a certain Portuguese religious confraternity who were the *fazendeiros* of the property both of plaintiff and defendant; that this confraternity permitted a cross to be erected on the land at which the Portuguese inhabitants [651] then resident in the houses, now occupied by the plaintiff and the defendant, and other adjoining houses situate on land belonging to the confraternity used to assemble and worship: that the Portuguese having left the locality the cross was removed, and the part of the open space now enclosed by the defendant was sold to him by the confraternity on the 26th July 1887. He denied that the vacant space had been used as a place for recreation, or that the plaintiff and his predecessors in title had enjoyed its use as a footway or carriageway for twenty years. He further alleged that sufficient space had been left for a footway and carriageway.

Jardine and *Anderson*, appeared for the Plaintiff.

Lang and *Inverarity*, for the Defendant.

The lower Court (PARSONS, J.) held that the plaintiff was entitled to the use of the drain referred to in the plaint, but as to the other claims in the plaint the suit was dismissed with costs. The Court found that the space was not originally intended for, and had not been used by, the occupants of the plaintiff's house as alleged in the plaint; that the plaintiff and his predecessors in title and the occupants of his house had not used the space in the mode stated

in the plaint for more than twenty years, and that the plaintiff was not entitled to the space as a footway or carriageway."

The plaintiff appealed.

Macpherson (Acting Advocate-General) and Anderson, for the Appellant (Plaintiff), contended, that there was ground for holding that the space in question was a public highway; and on this point cited *Rex v. Lloyd*, 1 Camp., 260; *Rex v. Barr*, 4 Camp., 16; *Rugby Charity v. Merryweather*, 11 East, 375, notes; *Vernon v. Vestry of St. James, Westminster*, 16 Ch. D., 449. But it was not necessary to claim it as a highway. Regarding the right claimed by plaintiff as an easement, or a right arising out of an implied grant, they cited *Selby v. Crystal Palace District Gas Company*, 30 Beav., 606; *Bourke v. Davis*, 44 Ch. D., 110; *Goddard on Easements*, (4th Ed.), p. 101.

[652] *Lang and Interarity*, for the Respondent (defendant), contended that there was no evidence that the land in question had been dedicated to the public, or that it had been used except for the purpose of passing to and from one of the adjoining houses.

Farran, J. :—The evidence on the record is insufficient, in our opinion, to establish that the land, which is in dispute round the cross, has been dedicated to the public. There is nothing to show that any public body has ever taken upon itself the care or the lighting of the place, or that the public ever resorted to it except that members of the Roman Catholic community in Bombay used to visit, and worship near, the cross. The cross has, however, been removed by the directions of the representatives of that community, and the right to visit the *locus in quo* for the purpose of worshipping at the cross, if it ever was a right vested in the public, has consequently ceased with the removal of the cross. Although a *cul de sac* like this may be impliedly dedicated to the public—*Vernon v. Vestry of St. James, Westminster*, 16 Ch. D., 449; *Rex v. Lloyd*, 1 Camp., 260, *Daniel v. North*, 11 East, 372,—it requires stronger evidence to prove the dedication of such a place than is called for to prove the dedication of a way or road left open at either end without gate or notice to indicate its private character. This absence of proof and the absence of allegation in the plaint that the place has been devoted to the public, render it unnecessary for us further to consider the arguments which have been presented to the Court in this aspect of the case.

The next question which arises for consideration is whether the evidence establishes that it has been set apart by the *fazendari* owner of the oart for the more comfortable enjoyment of the several owners of the houses abutting upon it and upon the more narrow passage by which it is approached from the main street, which would imply the user of it for the purposes for which open spaces surrounded by houses are commonly used, including the user of it for the purpose of driving carts and other vehicles over it and turning them upon it. Upon a building estate land is thus set apart by grant or [653] covenant, and the grant or covenant may be either express or implied. In *Selby v. Crystal Palace District Gas Company*, 30 Beav., p. 606, in laying out a building estate, lands were set apart by express covenant to be used as roads, as if the same were public roads. *Espley v. Wilkes*, L. R. 7 Ex., 298, was the case of an implied covenant or grant by a grantor, that land, which in the plan annexed, to the grant was described as "new street," should be kept as, at least, a private street. Somewhat similar is the case of *Brown v. Alabaster*, 37 Ch. D., 491, where a grant of a house with a garden at the back was held to carry with it a right of way over a defined roadway into the garden behind, though it was not a way of necessity. It passed as a continuous and apparent easement. All the earlier authorities are collected and analysed in that case.

But in all these instances the origin of the grantee's title and the circumstances under which the grant was made were known; and an implied grant or covenant was presumed from the known circumstances of the grant itself. *Moody v. Steggles*, 12 Ch. D., 261, was, however, a case in which the circumstances, under which the right claimed by the plaintiff arose, were unknown; and the Court from long and uninterrupted user implied a grant. In this way a grant was also presumed in the case of *Lancaster v. Eve*, 5 C. B. (N. S.), 717. The law is thus stated by FRY, J., in the former case: "Where there has been a long enjoyment of property in a particular manner, it is the habit, and, in my view, duty, of the Court, so far as it lawfully can, to clothe the fact with right." If, therefore, the evidence in this case shows that the vacant space in front of the plaintiff's premises has been used by the occupiers and owners of his and the other houses in the oart in a particular manner for a long series of years, I think it is the duty of the Court to infer a legal origin for such user.

This naturally leads us to consider the evidence in the present case. There is no extant record, or direct proof, by which it is possible to determine the reason why the narrow passage which leads from the main street was allowed to widen out into an open space at its northern end. It may have been left vacant to [654] allow ample room for worshippers at the cross to kneel and stand around it, or the cross may have been erected there because a suitable vacant space already existed, having been left unoccupied for some other reason. The fact that the cross is supposed to have been erected by public subscription rather points to the latter hypothesis as the correct one, but it is conjecture. We know from the plan (Exhibit No. 4) that before, and in, the year 1836 the vacant space existed almost exactly as it now exists, and the cross then had been erected upon it. The buildings which at that time stood in the oart were of an unsubstantial kind, described as *tatti* huts, and it may safely, we think, be inferred that the leaving of the vacant space and the letting out of the building lots were co-eval. From the plan (Exhibit 4) alone it is not quite clear whether at its date the broad space was treated as part of the passage of the oart or not. Its colouring on the plan is the same as that of the narrow passage leading to it, and to get to plots Nos. 5, 6, 7 and the northern part of plot 18, it was necessary to pass over it. On the other hand, the words on the plan "passage of oart of 3a" rather markedly turn to the east on reaching the northern extremity of the narrow passage, as though the draftsman avoided writing on the wider space. The fact, however, that the only approach to the plots we have enumerated is over the vacant space, and that in the old deed of 1828 (Exhibit G) the vacant space is described as a road, and that there is no line or mark on the plan separating it from the narrow passage, lead, I think, to a strong inference that the vacant space was then treated as a continuation of the passage, and the turning of the words descriptive of the passage to the east is intended rather to include the space between plots 8 and 9 in the passage than to exclude the broad vacant space from it.

As far as the memory of living witnesses goes back, the vacant space has existed and has been used by the inhabitants of the oart for all sorts of purposes. Carts and *recklas* which come up the narrow lane turn on it, and there is evidence that they have been in the habit of being driven to the northern extremity when houses are being rebuilt or repaired. Building materials are laid on it; the inhabitants and their visitors pass over it; clothes, rice, &c., are exposed over or on it to dry; *pendals* on ceremonial [655] occasions are erected, and children use it to play in. A drain, which leading up the narrow passage branched off to the east and west when it reached the broad space, was in 1871 built through it by means of a contribution from most of the inhabitants of the

oart to lead off the sullage water from their several houses ; water-pipes, a little later, were laid down in it. All this has been done without, as far as the evidence shows, any permission being asked from, or given by, the *fazendari* owners of the oart. In one letter of 26th April 1872, which was put in, it is, however, stated that the *fazendar* of the lane had no objection to each household connecting his drains with the general drain which had been then constructed ; but this applied equally to the houses along the narrow lane and to those surrounding the broad space, and it does not appear that the *fazendar* was ever, in fact, consulted on the subject. The statement was made apparently to induce the recipient to bring pressure to bear on the owners of houses Nos. 41, 42 to pay their shares of the cost of constructing the general drain, fearing, I suppose, that they might allege that they had not applied to open connection with it. No inference as to the user of the lane and open space being permissive can, we think, under the circumstances be drawn from this statement of D'Penha. At the utmost it only shows that he considered the consent of the *fazendar* requisite to justify the householders in breaking up the land to form such connections.

Under these circumstances we consider that the Court is justified in presuming, and ought to presume, a covenant on the part of the *fazendari* owners of the oart to keep the lane, including the upper end of it, open for the use of the owners of the houses abutting upon it. It seems to us that such a covenant should be presumed equally in the case of a land-owner granting land for building purposes to *fazendari* tenants on a perpetual tenure at a quit-rent and in the case of one selling land out and out for building purposes.

The case, however, which we have thus indicated as established by the evidence was not the case put in argument before the learned Judge in the Court below, and it varies in some degree from the case as put forward in the plaint. The broad space is there [656] alleged to have been "intended,"—by which we presume is meant "set apart,"—by the *fazendari* owners for the residents in the lane, and used by them in common, for purposes of recreation ; the plaintiff bases his right to drive and turn his carriages and vehicles on it upon a user of it in this manner by himself and his predecessors for many more than twenty years. His prayer is that it may be declared that he and the occupants of his house are entitled to the free and uninterrupted user of the open space for purposes of recreation and as a footway and carriage way from his house and as a place in which carriages may stand and turn. The relief to which the evidence shows that he is entitled, is, in effect, the same as that which he prays for—to have the broad space which the defendant has enclosed with a wall left unobstructed. It is true that a plaintiff must succeed not only *secundum probata*, but also *secundum allegata* ; but we think that it would be taking a too technical view of the pleadings to hold because the plaintiff alleges that the place was set apart for recreation, and the evidence establishes that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation purposes), that the plaintiff ought on that account to fail altogether and be left to a fresh action. If the defendant had been misled or induced to refrain from calling evidence to rebut the plaintiff's case, this course might be adopted ; but here the defendant has called evidence which, in the main, coincides with that of the plaintiff.

We must not omit to notice that before the defendant purchased and enclosed the open space the plaintiff wanted to buy part of this very land, but the plaintiff has only recently purchased his house in the oart and may have been misled by the *fazendari* owner offering the open space for sale. The defendant has not been misled by this, for the covenants in his

purchase deed show that he was aware that he was purchasing with a doubtful title and one which would probably lead him into a law suit.

For these reasons we consider that the plaintiff is entitled to a decree in terms of the prayer of his plaint (which should in express terms exclude from its operation the space heretofore [657] actually occupied by the cross). As the case has been presented to this Court in an entirely different aspect from that in which it was presented to the Court below, due no doubt to the manner in which the plaintiff launched his case, we allow the appeal with costs, but without costs in the Court of First Instance, and vary the decree to the extent we have indicated.

Appeal allowed.

Attorney for the Plaintiff:—Mr. *Mirza Hussein Khan*.

Attorneys for the Defendant:—Messrs. *Ardesir, Hormasji and Dinsha*.

[17 Bom. 657]
ORIGINAL CIVIL.

The 4th April, 1892.

PRESENT:

MR. JUSTICE PARSONS.

Ahmed bin Shaik Essa Khaliffa and others.....Plaintiffs
versus
Shaik Essa bin Khaliffa and others.....Defendants.*

Decree—Execution—Alteration of decree—Decree in terms of an award ordering (inter alia) delivery of moveable property—Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay value of such moveable property in event of failure to deliver—
Civil Procedure Code (XIV of 1882),
Secs. 206-b—Practice.

A partition suit brought by a son against his father was referred to arbitration. On the 9th January 1890, the award was published, and on the 27th March 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, viz, Rs. 40,000 to be paid forthwith and the balance of Rs. 65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November 1890. At the date of the decree the vessel 'Sambuk' was at sea on a voyage, and on the 18th June 1890, while still on the voyage, she was lost. On the 15th November 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel 'Sambuk' had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendant, however, demanded the delivery of the buglow, which he stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended [658] or rectified by stating therein the amount of money to be paid to the defendant as an alternative if delivery of the vessel 'Sambuk' could not be made, such delivery having become impossible.

* Suit No. 383 of 1886; Appeal No. 746.

Held, that the rule must be discharged. The objection was to an award, not to a decree. Possibly it might have been open to the parties to object to the award before it was filed, on the ground that it ought to have stated a sum to be paid to the defendant in case some of the property could not be delivered to him. If such an objection had been made, the Court might possibly have remitted the award, or refused to file it. No such objection, however, was taken, and the award was filed, and a decree obtained, in accordance with the award. The award could not be modified by the Court, nor could the decree, which must be in accordance with the award.

SUIT for partition. The first plaintiff was the son of the first defendant, and he brought this suit in September 1886, praying that the property of his grandfather Khaliffa bin Abdulla might be divided and partitioned among the parties entitled thereto according to their rights and interests therein.

By a consent order, made in the suit on the 15th August 1889, the suit and all matters in difference between the parties were referred to arbitration. On the 9th January 1890, the arbitrator made and published his award, which was filed on the 11th March 1890. On the 27th March 1890, on a motion made on behalf of the defendants, a decree was passed in terms of the award.

By this decree it was ordered that in full satisfaction of the claim of the plaintiff the first defendant should pay to the plaintiff the sum of Rs. 1,05,000 in the manner therein provided, *viz.*, that the sum of Rs. 40,000 should be forthwith paid by the said defendant and the balance of Rs. 65,000 should be paid "upon the said plaintiff's delivering over to the said Shaik Essa bin Khaliffa the five boxes mentioned in paragraph 5 of the plaint and two buglows 'Nasri' and 'Sambuk' referred to in the affidavit of Ahmed bin Essa, and the whole of the immoveable property in the Persian Gulf, &c." The said decree further provided that in no event should the defendant be required to pay the said balance of Rs. 65,000 before the 15th November 1890.

At the date of the said decree the vessel "Sambuk" was at sea on a voyage, and on the 18th June 1890, while still on the voyage, was lost.

[659] On the 15th November 1890, the plaintiffs' attorneys wrote to the defendants' attorneys reminding them that the sum of Rs. 65,000 had become due on that day, and requiring payment. They offered to deliver the other properties mentioned in the decree, but stated that the vessel "Sambuk" had been lost at sea. In the correspondence which subsequently took place, the plaintiffs offered to pay the value of the lost vessel "Sambuk," but they and the defendants could not agree upon the value. The plaintiffs estimated her value at Rs. 1,000, but the defendants' attorneys in a letter of the 20th December 1890, said: "Our client wants the said buglow under one of the conditions in the decree, as your clients (*i.e.*, the plaintiffs) are bound specifically to deliver the same and as it is worth a very large sum in our client's estimation."

The defendant having under these circumstances refused to pay the Rs. 65,000 the plaintiff applied for execution of the decree, but on the 16th July 1891, his application was refused.

The plaintiff then (on the 19th March 1892) obtained a *rule nisi*, calling on the first defendant to show cause why the decree of the 27th March 1890, should not be amended or rectified by stating therein the amount of money to be paid to the said first defendant as an alternative if delivery of the vessel named "Sambuk" could not be made to the said first defendant, and "why such further or other order should not be made as justice and good conscience require in consequence of the loss of the said vessel 'Sambuk' and by reason of all the circumstances of the case as disclosed in the said affidavit, and why (if necessary) the amount of money to be fixed as an alternative for the delivery

of the said vessel should not be ascertained by this Honourable Court or by the arbitrator, Mr. Shaik Abdul Aziz bin Ali Ebrahim, heretofore appointed in this suit after taking such evidence as may be necessary." In his affidavit the plaintiff said: "The plaintiffs are unable to execute the said decree for the balance thereof and interest without having the said decree amended by this Honourable Court in the following respect, namely, in regard to the delivery of the said vessel 'Sambuk,' the delivery of which has become impossible by [660] the act of God. Under the circumstances aforesaid this Honourable Court will be pleased to direct that the said decree should be amended by stating therein the amount of money, i.e., the value of the said vessel 'Sambuk,' which is to be paid to the defendant in lieu of delivering the said vessel."

Jardine for the Defendant showed cause:—The decree was in terms of an award. The Court cannot alter it. The decree provided for the payment of Rs. 65,000 on the plaintiff's handing over certain specified property, in which the ship "Sambuk" was included. If that property is not handed over, there is no obligation on the defendant to pay the money. Section 208 of the Civil Procedure Code (XIV of 1882) does not apply. He referred to rules Nos. 108 and 204 of the High Court Rules.

Kirkpatrick for Plaintiff, *contra*:—We do not apply to alter the decree. We merely ask that the Court should make its decree in the form required by the law by inserting the words prescribed by section 208 of the Code (XIV of 1882). It was for the Court to see that its decree was in proper form. The fact that the decree is on an award makes no difference. The decree is the decree of the Court and not that of the parties. Section 208 gives no discretion to the Court—*Daniell's Chancery Practice*, Vol I, p. 822 (6th Ed.); *Ishwardas v. Dosibai*, I. L. R., 7 Bom., 316; *Karim v. Rajooma*, I. L. R., 12 Bom., 174; *In re Swire*, 30 Ch. D., 239, at p. 246; *Hughes v. Jones*, 26 Beav., 24; *In re Havelock's Trusts*, 35 L. J., (Ch.) N. S., 228. The Court has corrected the decree where the property was immovable property—*Ram Saran v. Persidhar Rai*, I. L. R., 10 All., 51; *Sundara v. Subbanna*, I. L. R., 9 Mad., 354; *Vithal Janardan v. Vithojirao*, I. L. R., 6 Bom., 586; *Shivapa v. Shivpanch Lingapa*, I. L. R., 11 Bom., 284; section 10 of Charter of Supreme Court.

Parsons, J.:—I am unable to interfere in this matter, which is really an objection, not to a decree, but to an award, and the cases cited do not touch that point. The parties referred their [661] dispute to private arbitration, and the award made was filed under section 526 of the Civil Procedure Code (XIV of 1882), and a decree followed thereon. Possibly it might have been open to the parties to have objected, before the award was filed, that the award ought to have stated the amount of money to be deducted from the sum payable to plaintiff in case the latter could not deliver all the moveable property he was ordered to deliver to the defendant before he got the Rs. 65,000. Had such an objection been taken, the Court possibly might have either remitted the award or refused to file it. No such objection, however, was taken, and the Court, with the consent of all parties, ordered the award to be filed, and a decree followed in accordance with the award. It is impossible for the Court now to set aside that decree and remit the award to the arbitrator for him to determine afresh what sum the plaintiff shall receive now that the ship has been lost and the plaintiff is unable to deliver it to the defendant, and it is equally impossible for the Court to determine the then value of the ship itself and order that the plaintiff shall receive the sum of Rs. 65,000 less that value on delivering to the defendant all the property except the ship. The award cannot be so modified by the Court, and if the award cannot, then the decree which follows it cannot, for it must be in accordance with the award. There is no

injustice whatever in the case, for the delivery of the property was at the option of the plaintiff, and the impossibility of delivery of all the property may have been in the mind of the arbitrator when he made the award.

Rule discharged.

Attorneys for the Plaintiff:—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the Defendant:—Messrs. *Little, Smith, Nicholson and Bowen.*

NOTES.

[See the appellate decision in (1894) 18 Bom., 495.]

[662] ORIGINAL CIVIL.

The 7th July, 1893.

PRESENT:

SIR CHARLES SARGENT, KT, CHIEF JUSTICE, AND MR. JUSTICE STARLING.

Girdhar Damodar.....Plaintiff

versus

Kassigar Hiragar.Defendant.*

Jurisdiction—Foreigner—Non-resident foreigner carrying on business by his munim in Bombay—Small Cause Court—Small Cause Court Act (XV of 1882), Sec. 18.

Where a foreigner who did not reside in Bombay carried on business there by his *munim*, *Held*, that under section 18† of the Small Cause Courts Act (XV of 1882) the Small Cause Court in Bombay had jurisdiction to try a suit brought against him in that Court.

Per SARGENT, C. J.—*Prima facie* the word ‘defendants’ in clause (b) of section 18 has the same meaning in each of the three cases in which that clause gives [663] jurisdiction to the Court; and as the word clearly includes non-British subjects among the defendants over whom the clause gives jurisdiction if they are “resident,” or “personally work for gain,” within the territorial limits of the Small Cause Court, it would be a strained construction to

* Small Cause Court Suit No. 21864 of 1892.

† Section 18 of the Presidency Small Cause Courts Act (XV of 1882).

Subject to the exceptions in Section 19, the Small Cause Court shall have jurisdiction to try all suits of a civil nature.

When the amount or value of the subject-matter does not exceed two thousand rupees; and

(a) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of the suit; or

(b) all the defendants, at the time of the institution of the suit, actually and voluntarily reside, or carry on business, or personally work for gain, within such local limits; or

(c) any of the defendants, at the time of the institution of the suit, actually and voluntarily resides, or carries on business, or personally works for gain within such local limits, and either the leave of the Court has been given before the institution of the suit, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution.

Explanation I.—When in any suit the sum claimed is, by a set off admitted by both parties, reduced to a balance not exceeding two thousand rupees, the Small Cause Court shall have jurisdiction to try such suit.

Explanation II.—Where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation III.—A corporation or company shall be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

hold that it did not include them among the defendants over whom the clause gives jurisdiction on the ground that they are "carrying on business" within the limits.

Although it is true that a non-British subject, who does not personally carry on business within the territorial limits of the Court, does not make himself personally subject to the municipal law of British India, still, by establishing his business in British India, from which business he expects to derive profit, he accepts the protection of the territorial authority for his business and his property resulting from it, and may be fully regarded as submitting to the Courts of the country.

THIS was a case stated by C. W. Chitty, Chief Judge, for the opinion of the High Court, under section 69 of the Presidency Small Cause Courts Act (XV of 1882).

The suit was brought by the plaintiff in the Court of Small Causes to recover from the defendant the sum of Rs. 1,300-11-6, being the price of goods sold by the plaintiff to the defendant in Bombay.

It was admitted that the defendant resided in Cutch, out of the jurisdiction of the Court, and that he carried on business in Bombay by a *mumim*. It was also the fact that no leave of the Court had been obtained for the institution of this suit.

Several defences were pleaded by the defendant at the trial, but the only one material to this report was the defence that the Court had no jurisdiction to try the suit. At the conclusion of the hearing the Chief Judge gave judgment for the plaintiff, but at the defendant's request he stated a case for the High Court. One of the questions on which the opinion of the High Court was asked was the following:—

Whether the Court had jurisdiction, the defendant not being a resident of Bombay or a British subject, but a resident of Cutch, and no leave having been obtained to file this suit?

Macpherson and Inverarity for Defendant:—The defendant is a foreigner, who does not reside in Bombay, and we contend that the Court has, therefore, no jurisdiction. The jurisdiction of the Court must be based either on clause (a) or clause (b) of section 18 of the Presidency Small Cause Courts Act (XV of 1882). These [664] clauses give jurisdiction, 1st, where the cause of action wholly or in part has arisen within the local limits and leave has been obtained; 2ndly, where the defendant (a) actually and voluntarily resides, or (b) carries on business within the local limits. The action is brought to recover the price of goods sold to the defendant in Bombay. The cause of action having thus arisen in Bombay the Court of course would have had jurisdiction if leave had been obtained (section 18); but it is admitted that no leave was obtained in this case. So the jurisdiction (if any) must arise from some other circumstance, and clause (a) may be excluded from consideration. It is also admitted that the defendant does not reside within the jurisdiction. The sole ground, then, upon which jurisdiction over the defendant can be claimed is that by his *mumim* he carries on business in Bombay, and the question is, does this circumstance give the Court in Bombay jurisdiction over a non-resident foreigner? We say it does not. We contend that the expression "or carry on business" in clause (b) of section 18 must be read "or being British subjects carry on business." The words "being British subjects" must be understood, for the Indian Legislature has no power by its laws to give its Courts jurisdiction over non-resident foreigners. That is a principle recognized by all Legislatures and Courts of justice—Reports of State Trials, New Series, Vol. IV, p. 1331; *Lopez v. Burslem*, 4 Moore's P. C. C. 300, at p. 305; and see *Kessowji Damodar Jarram v. Khimji Jarram*, I. L. R., 12 Bom., 507. Legislatures can only affect foreigners who reside within their territory. In *Macleod v. Attorney General for New South Wales*, L. R., (1891), Ap. Ca., 455, it was held that in an Act of the New

South Wales Legislature, inflicting a punishment for bigamy "whosoever the second marriage shall take place," the word "whosoever" must be read "whosoever in this colony." We adopt the argument-addressed to the Court for the defendant in the case of *Kessowji Damodar Jairam v. Khimji Jairam* I. L. R., 12 Bom., 507, (see pages 510, 511 and 512 of the report.)

Scott, for Plaintiff, *contra*.—The Court has jurisdiction. This Court in construing an Act of the Legislature has no power to add words to it. I contend that the decision in *Kessowji Damodar [665] Jairam v. Khimji Jairam*, I. L. R., 12 Bom., 507, was wrong and should not be followed, and I adopt the argument made in that case (see p. 513 of the report) for the plaintiff. In that case SCOTT, J., added words to the Letters Patent. That case is in conflict with *Harivallabhdas v. Utamchand*, 8 Bom. H. C. Rep., 236 (O. C. J.), on which I rely. Counsel also cited *Daniel v. Oakley*, 28 Sol. Journal, 477.

Macpherson in reply :—If the words "being a British subject" are not imported into section 18 (clause b) we impute an intention to the Indian Legislature to do what it has no power to do.

Sargent, C. J.—The only question which has been argued before us in this Small Cause Court reference is whether clause (b) of section 18 of the Small Cause Court Act (XV of 1882) confers jurisdiction on the Small Cause Court when the defendant is not a British subject and resides outside the territorial limits of that Court, but is "carrying on business" by a *munim* within those limits. That such "carrying on business" need not be "personal" was, I think, not disputed. The decision of the Madras Court in *Nuthaya Chetti v. Allan*, I. L. R., 4 Mad., 209, on the same words in the Letters Patent, and the reasons given by TURNER, C. J., for so holding, are, I think, conclusive. The soundness of the early decision of the Madras Court to the contrary in *Subbaraya Mudali v. The Government, &c.*, 1 Mad. H. C. Rep., 286, was, I may remark, doubted by SAUSSE, C. J., and ARNOLD, J., in *Framjee Cowasjee v. Hormasjee Cowasjee*, 1 Bom., H. C. Rep., 221.

Passing to the real question in this reference, *viz.*, whether the case of defendants carrying on business within the territorial limits of the Small Cause Court,—which it is to be observed are the same as those of the High Court,—must be restricted to British subjects, is not free from authority. In *Kessowji Damodar v. Khimji Jairam*, I. L. R., 12 Bom., 507, Mr. Justice SCOTT, construing similar words in section 12 of the Letters Patent, 1865, held that they must be confined to British subjects.

It is to be remarked, at the outset, that the general term "defendants" precedes and governs the whole of the clause (b) and, therefore, *prima facie* it was intended to have the same [666] meaning when read with each of the three several cases mentioned in the clause as giving the Court jurisdiction; and as non-British subjects are clearly subject to the jurisdiction if they are "resident" or "personally work for gain" within the territorial limits of the Small Cause Court, it would be a strained construction of the clause to hold that they were excluded when the ground of jurisdiction is that they are "carrying on business" within those limits. The learned Judge who decided *Kessowji Damodar v. Khimji Jairam* was not unconscious of this difficulty in excluding non-British subjects, but he held that he ought to disregard it, as "to do otherwise," he said, "would be a violation of the rule that every statute is to be construed and applied, so far as the language admits, so as not to be inconsistent with the comity of nations; or with the established rules of private international law."

There is no authority that I am aware of, nor was any referred to in argument, for there being a rule of construction couched in such very general

terms. The rule as stated by Lord ESHER, M. R., in the important case of *Companhia de Mozambique v. British South Africa Company*, L. R. (1892) 2 Q. B., 358 at p. 394, is that "the question whether the Courts of a nation will or will not entertain jurisdiction of any dispute is to be determined exclusively by its nation itself, i.e., by its municipal law. If by express legislation the Courts are directed to exercise jurisdiction, the Courts must obey. If there is a proper inference to the same effect, the result is the same. But there are certain rules which have by universal consent indicated the circumstances from which the inference may properly be drawn." One of those rules, as stated by the Court in *Ex parte Blain*, 12 Ch. D., 522, is that, *prima facie*, all legislation is territorial, in the sense, as stated by JAMES, L. J., that, "unless the contrary is expressly enacted or plainly implied, legislation is only applicable to foreigners who by coming into England, whether for a long or short time, have made themselves subject to English jurisdiction," and accordingly the Court in that case held that the Bankruptcy Act is not to be construed so as to give the Court of Bankruptcy power to adjudicate a foreigner bankrupt, who, although member of an English firm carrying on business in England, had never been in England and had not [667] committed any act of bankruptcy in England. The above principle was doubtless assumed in the decision of the Privy Council in *Lopez v. Burslem*, 4 Moo P. C. C., 300, and also by the House of Lords in *Jefferys v. Boosey*, 4 H. L. C., 815, where it was held that the Copy-right Act did not apply to foreigners resident abroad: and again in *Macleod v. Attorney-General of New South Wales*, L. R., (1891) Ap. Ca., 455, the Privy Council held that an Act of the New South Wales Legislature, which legislated as to the offence of bigamy, must be confined to an act done within the territorial jurisdiction of New South Wales, but it is to be remarked that these were all cases in which the Legislature conferred a benefit or imposed a penalty as the consequence of some act done or omitted to be done, and, therefore, have no direct bearing on the construction of such an Act as that under consideration. The question is whether the Legislature did not intend to depart from the general territorial rule. It may be true that non-British subjects who do not reside in British India do not make themselves personally subject to the general municipal law of British India, still by establishing their business in British India, from which business they expect to derive profit, they accept the protection of the territorial authority for their business and their property resulting from it, and may be fairly regarded by so doing as submitting to the jurisdiction of the Courts of the country. Moreover, in considering what was the true intention of the Legislature, it is right to bear in mind the special circumstances of the presidency towns in this country as regards the great number of non-British subjects who carry on trade within them, either personally or by their *munims* and other agents, and are constantly having transactions with British subjects giving rise to causes of action both within and outside the presidency towns, the latter of which do not fall under clause (a)—a circumstance which might well affect the Legislature in determining the jurisdiction of the presidency Courts, as regards defendants.

These considerations coupled with the general language of the clause, which, as already observed, requires it to be construed as giving jurisdiction to try suits against defendants generally who [668] satisfy any one of the conditions mentioned in the clause irrespective of their being British or non-British subjects, create, in my opinion, a strong presumption in favour of a less strict application of the "territorial" principles of construction above referred to, than was adopted in *Kessouji Damodar v. Khimji Jaiaram*, I. L. R., 12 Bom., 507; and I cannot think that the above considerations are entitled to less

weight because the construction would enable actions to be brought in the Presidency Courts against non-British subjects on causes of action arising out of British India or even out of India. Such causes of action would necessarily be personal actions, to which the rule of territoriality has never been applied in England. It was urged, indeed, that the tribunals of other countries would not give effect to the judgment of the Small Cause Court in such cases; but such an argument is entitled to little weight, if indeed it is not quite irrelevant as observed by Lord HOBHOUSE in delivering the judgment in *Ashbury v. Ellis*, L. R., (1893) Ap. Ca., 339, in the following terms:—"When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case."

Upon the whole I am of opinion that the Small Cause Court had jurisdiction to try the suit, and the question as to the jurisdiction must, therefore, be answered in the affirmative.

Starling, J.:—In this case the plaintiff sues the defendant, who is the subject of a native State, in respect of a cause of action arising wholly within the jurisdiction of the Bombay Court of Small Causes, alleging that he is carrying on business within the jurisdiction. The fact that the cause of action arose within the jurisdiction will not in this case justify the filing of the suit, because the leave of the Court was not obtained to its being filed in accordance with clause (a) of section 18 of Act XV of 1882; consequently the only point which the Court has to consider is whether a non-resident foreigner carrying on business within the city of Bombay can be sued in the Small Cause Court.

Now it seems to me that, in this case, we have nothing to do with questions of international law. All we have to do is to [669] determine whether the defendant is a person against whom the Legislature has permitted a suit to be filed in the Courts of this country, in which a decree can be passed and executed in this country against the property of the defendant within the jurisdiction, and against his person if he comes within the jurisdiction; and I am of opinion that the defendant, who admittedly has a firm in Bombay in which he carries on business through his *munim*, is such a person. In this conclusion I am supported by the case of *Ex parte Blain*, Ch. D., 522, in which JAMES, L. J., at page 526, says: "No doubt it (*i.e.* the English Legislature) has a right to say to a Chilian, or to any other foreigner, 'If you make a contract in England, or commit a breach of contract in England, under a particular Act of Parliament, a particular procedure may be taken by which we can effectually try the question of that contract, or that breach, and give execution against any property of yours in this country.' But that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognized abroad remains to be considered, and must be determined by the tribunals abroad. If a foreigner, being served with a writ under the provisions of the Judicature Act, did not choose to appear, and the Legislature said, 'If you do not appear you will commit a default in that way, and we will give judgment against you,' whether that judgment would, under the circumstances, be recognized by foreign tribunals, as being consistent with international law and the general principles of justice, is a matter which must be determined by them." COTTON, L. J., also at page 531, says: "We are not dealing with the question which might arise if an English Act of Parliament had expressly said that, as against a Chilian subject, or any other alien who had never been in England, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be the duty of the Court, acting in the execu-

tion of the English Act of Parliament, whatever the consequences might be and however foreign nations might object, to say, this is the English Statute, and we must act on it, and the question which you, a foreigner, raise, we are bound to disregard."

[670] Now these two passages seem to me fully applicable to this case. The Legislature has enacted that, if a person carries on business within the jurisdiction, a suit may be brought against him, and I do not think we ought to explain away the plain words of this enactment and say that it is not every person who carries on business within the jurisdiction who may be sued, but only British subjects. What a foreign Court might do, if a decree in such a suit were sued upon in such a Court, is not a question which we need discuss, and this is distinctly laid down in the case of *Ashbury v. Ellis*, L. R., (1893) Ap. Ca., 339.

Cases in bankruptcy do not afford much help in the elucidation of the present question, for it is a local enactment extending to England only, and many of its provisions are highly of a penal nature.

In *Ex parte Crispin*, L. R., 8 Ch., 374, it was held that a foreigner who comes to England temporarily, contracts debts, and then commits an act of bankruptcy, can be made a bankrupt although he may be abroad at the time the petition is filed. This decision has never been disapproved of, but on the contrary was quoted with approval in *Ex parte Pascal*, 1 Ch. D., 509, in which at page 512, MELLISH, L. J., cites that case, and holds that it makes no difference if the debt were contracted abroad. The real test in these cases is whether the defendant has done within the jurisdiction, either personally or by his authorized agent, an act which brings him within the terms of the enactment applicable to his case, and I do not see any reason why the trading of a foreigner by his servants within the jurisdiction should not be held to be such an act.

The case of *Ex parte Blain* has been relied upon by the defendant, and also by SCOTT, J., in *Kessowji Jairam v. Khimji*, 1 L. R., 12 Bom., 507, as showing that Act such as the Bankruptcy Act and the present one cannot operate upon foreigners who reside outside the jurisdiction. I do not think that is the effect of *Ex parte Blain*. It seems to me that the *ratio decidendi* of that case was that the Chilean partners had never been within the jurisdiction, and consequently could not have personally committed an act of [671] bankruptcy by a particular act of their agents (the English partners) which they had not authorized, and of which they had not cognizance, and that, as such was the case, the Court would not assume that the Legislature intended that an act of partners in England not authorized by the Chilean partners should operate upon the latter, who were not actually subject to the jurisdiction in a case where the operation would result in a compulsory personal attendance in England. If this be the true view of that case, it in no way militates against the conclusion to which I have come.

It has never been doubted that under certain circumstances a suit could be brought in England against a foreigner, and the questions which have arisen have always been as to what was good service of the writ; generally whether it could be served as a matter of course, or whether leave of a Judge must be obtained, or whether notice only of the action should be given. This remark applies to all the cases cited on the recent rules under the Judicature Acts as to suits against firms. Partners can now be sued in the name of their firm, and the questions that have arisen have been as to how service of the writ in the action was to be effected. The Judges have seemed to be of opinion that service as a matter of course in certain instances would be an infringement of international law, but yet it would appear that they admitted the possibility of

the writ being served by leave of a Judge. Consequently these cases, in my opinion, only apply to the construction of certain new and rather complicated rules of practice which really do not give us any practical assistance in the present case. Besides which, the question is, not whether a writ can be served but whether an action can be brought. When one looks at the changes there have been in the rules themselves and the divergent decisions of various Courts on the rules, it can hardly be said that the practice in England has at present been put upon a satisfactory basis so as to afford unerring guidance to us in such a case as the present.

Attorneys for the Plaintiff Messrs. *Bharishankar and Kanga*

Attorneys for the Defendant — Messrs. *Little Smith, Nicholson and Bouc*

NOTES

[In (1903) 26 Mad. 544 at 552 the Privy Council observed: 'In both Courts in India it was apparently assumed that the question of jurisdiction turned on sec. 16 of the Code of Civil Procedure and that although the defendant was a foreigner and although the cause of action arose in a foreign country and although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India and was not even temporarily in Arcot when sued there, the plaintiff could sue in the Arcot Court if he carried on business through an agent in the local limits of that Court's jurisdiction.' This assumption appears to their Lordships to require no mention here as it is correct.]

Their Lordships see no reason for doubting the correctness of the decision of the case of 17 Bom. 662 where the defendant was a native of Calcutta and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought.

See also (1905) 29 Mad. 61 at 70 (1905) 29 Mad. 255 (1901) 11 M. L. J. 91 (1901) 25 Bom. 528 (1895) 20 Bom. 155 (1914) 38 Mad. 507 on appeal in 31 Mad. 163.]

[672] APPELLATE CIVIL

The 15th September 1892

P. 1892

SIR CHARLES SARGENT, CHIEF JUSTICE, AND MR. JUSTICE CANNY

*In re Gulabdas Bhaidas **

Company—Indian Companies Act VI of 1882, sec. 25. Shares issued as fully paid up. Rights of a purchaser with notice arising from a purchaser without notice. Notice contributory.

Twenty shares of the Balla Spinning Weaving and Manufacturing Company Limited, were originally all fully paid up shares partly for work done and partly for work to be done for the company. The agreement under which the shares were so allotted was not registered as required by section 24 of Act VI of 1882.

A sold three of these shares to D who held them until they were not fully paid up. D sold the three shares to G who was the managing director of the company. The company was wound up by the Court. At the date of the winding up G was held of the three shares. In settling the list of contributors the Court ordered G's name to be placed on the list in respect of the three shares.

Held that G was not liable to contribute. Though G was a managing director of the company and as such must have known that the shares had been issued as fully paid up.

* Appeal No. 10 of 1892.

* Section 25 of Act VI of 1882 provides as follows:—

Every share in any company shall be fully paid up and shall not have been issued and to be held subject to the payment of the whole amount thereof in cash unless the same has been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

shares without complying with section 28 of Act VI of 1882, he was not on that account estopped from taking advantage of the equitable rule which protects a purchaser with notice taking from a purchaser without notice.

APPEAL against the order of J. B. Alcock, District Judge of Surat, made in winding up proceedings, under the Indian Companies Act VI of 1882.

The Bella Spinning, Weaving and Manufacturing Company, Limited, was ordered to be wound up by the Court in 1881.

Twenty shares of this company were originally issued as fully paid up shares to one Dorabji, a contractor, partly for work done, and partly for work to be done for the company. The agreement under which the shares were so issued was not registered according to section 28 of Act VI of 1882.

[673] Dorabji sold three of these shares to one Dadyshtet, who had no notice that the shares were not fully paid up.

Dadyshtet sold the three shares to Gulabdas, who was the managing director of the company. At the date of the winding up, Gulabdas' name appeared on the register of the company as the holder of the three shares.

In settling the list of contributories, the District Court was of opinion that as Gulabdas was a managing director of the company he must be taken to have notice that the shares were not fully paid up, and that the fact of the intermediate holder not having notice, did not help him. The Court, therefore, held that Gulabdas was liable, as a contributory, to pay the full amount of the three shares. Gulabdas' name was accordingly placed on the list of contributories.

Against this order Gulabdas appealed to the High Court.

Kalabhai Lallubhai, for Appellant:—The appellant bought the shares from a person who had no notice of their not being fully paid up shares. The fact that the appellant had notice is immaterial. The ruling in *In re Stapleford Colliery Company*, 14 Ch. D., 432, is conclusive on the present question.

Ganpat Sadashiv Rao, for Respondents (Official Liquidators):—The appellant was a managing director of the mill. As such he must have known that the shares which he purchased were not, either in fact or in law, fully paid up. He cannot, therefore, avail himself of the equitable rule which protects a purchaser with notice taking from a purchaser without notice. That doctrine does not apply in the present case. The words of section 28 of Act VI of 1882 are clear. According to that section every shareholder is bound to pay, in cash, the full amount of the shares he holds, unless there is a registered agreement to the contrary. There is none such here. The appellant was, therefore, rightly put on the list of contributories.

Sargent, C. J.:—Twenty shares were originally issued to the contractor Dorabji as fully paid shares and registered in his name, of which three were sold and transferred to Mr. Dadyshtet, [674] who, it is admitted, had no notice that the shares were not fully paid up. The decision in *In re Stapleford Colliery Company*, 14 Ch. D., 432, shows that as between the company and Mr. Dadyshtet the three shares must be treated as paid up, and that he could make a good title to a purchase whether with or without notice. It appears that they were sold to the appellant Gulabdas, who was the managing director of the company, and it has been urged that, as such, he must have known that the shares had been issued as fully paid up shares without complying with section 28 of Act VI of 1882, and cannot, therefore, take advantage of the rule which protects a purchaser with notice taking from a purchaser without notice. This argument, however, was addressed to the Court in *In re Stapleford Colliery Company*, 14 Ch. D., 432, where the appellant and his father, whose executor he was, had been the solicitor and chairman of the company at the time of the agreement.

with the contractor; and yet the Appeal Court held that the fact of their being such officers made no difference in their title.

We are unable to distinguish the present case from the one referred to, and must, therefore, discharge the order of the Court below placing the name of Mr. Gulabdas on the list of contributories. Appellant to have his costs throughout.

Order reversed.

[17 Bom. 674]

APPELLATE CIVIL.

The 15th September, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Venkatesh Khando and another.....Plaintiffs
versus

Chanapagavda.....Defendant.*

Award—Civil Procedure Code (XIV of 1882), Sec. 525—Application for filing the award registered as a suit—Objections taken by the defendant—Court precluded from filing award.

An application for filing an award being registered as a suit, the defendant raised objections, and the following issues were raised.—

(1) Whether a certain arbitrator was nominated or accepted as one of the arbitrators by the defendant?

[675] (2) Whether there was any and what illegality apparent on the face of the award?

(3) Whether the proceedings conducted by the arbitrators were illegal?

Held that the objections taken by the defendant, which were the subject of the above issues, precluded the Court from filing the award.

THIS was a reference made by Rao Bahadur Vithal Vaikunth Vagle, First Class Subordinate Judge of Dharwar, under section 617 of the Civil Procedure Code (XIV of 1882).

The reference was as follows :—

"This was an application registered as a suit under section 525 of the Civil Procedure Code (XIV of 1882) for filing an award made by arbitrators appointed by the parties without the intervention of the Court.

"The defendant objected to the award being filed, on the following grounds :—

"(1) The application was time-barred.

"(2) The award was made without authority and was illegal.

"(3) His signature to the agreement of submission to the arbitration was obtained on 18th April 1891, without mentioning the names of the arbitrators. One Krishnaji Tirko's name was fraudulently inserted in the margin of the agreement in the place of Shripad Naik, and the parties were the same, day examined by the other two arbitrators in the absence of the said Krishnaji Tirko. The appointment of Krishnaji thus made was illegal.

"(4) Shripad Naik having refused to act as an arbitrator, he (defendant) prayed for the appointment of a Lingayat arbitrator whom he considered trustworthy. He was, however, told that it could be subsequently done, and that for the present nothing beyond the examination of accounts would be done. Under this misrepresentation his signature was taken to a stamped agreement on 28th April 1891, without disclosing the contents thereof. From that day

up to the last, the arbitrator Balkrishna Shastri never took any part in the arbitration.

"(5) The proceedings conducted in the absence of Krishnaji and Balkrishna are illegal; *a fortiori* the award based thereon was also illegal and void.

[676]" (6) The award was not made on the 15th June 1891, as it purports to be, but was made in the month of September.

"(7) He (defendant) repeatedly protested against the proceedings taken by the remaining arbitrators without appointing proper persons in the place of Balkrishna, who was absent, and of Shripad, who refused to act, but they paid no heed to it and refused to receive the written application given by him. He thereupon sent his application by post on 15th June 1891. They made an award on plain paper and fraudulently antedated it. Balkrishna Shastri's signatures to the proceedings were afterwards taken, and no copy of the award was given to him.

"(8) The plaintiffs have been awarded time-barred items and have wrongly discredited the receipts passed by the plaintiffs' deceased father for certain payments.

"(9) The two arbitrators, who really conducted the proceedings, did not take down his statements correctly and did not examine him fully. They rejected what evidence he tendered, and having accepted inadmissible evidence from the plaintiffs made the award with partiality in collusion with the plaintiffs.

"(10) The award could not be filed, the proceedings of the arbitrators being illegal, fraudulent and unjust."

The Court thereupon raised, in all, eight points for decision, out of which points Nos. 1, 2 and 3 were as follows:—

"(1) Whether Krishnaji Tirko was nominated or accepted as one of the arbitrators by the defendant?

"(2) Whether there is any and what illegality apparent on the face of the award?

"(3) Whether the proceedings conducted by the arbitrators were illegal?"

The Subordinate Judge referred the following point for decision:—

"Whether the Court has power to enquire into the allegations made by the defendant, and then to file the award, or refer the applicants to a separate suit, as it thinks fit according to the circumstances disclosed in the enquiry?"

[677] The Subordinate Judge's opinion on the point was in the affirmative. Dhondu M. Sanzgiri (*amicus curiæ*) for the Plaintiffs.

Narayan G. Chandavarkar (*amicus curiæ*), for the Defendant.

Sargent, C. J.:—The decision in *Samal v. Jaishankar*, I. L. R., 9 Bom., 254, which was followed in *Hirjibhai v. Jansetji*, P. J. for 1890, p. 250, and is in accordance with the remarks of the Calcutta Court in *Bijadhur v. Monohur*, I. L. R., 10 Cal., 11, is conclusive that the objections taken to the award by the defendant, which are the subject of issues 1, 2 and 3, preclude the Court from filing the award, unless, indeed, as Mr. Justice WEST expressed it in *Samal v. Jaishankar*, I. L. R., 9 Bom., 254, the Court considers the objections "obviously unfounded," which there is no ground for doing in the present case. The question, therefore, raised by the decision in *Dandekar v. Dandekars*, I. L. R., 6 Bom., 663, does not arise and need not be considered.

Order accordingly.

NOTES.

[The mere raising of objections was held to oust the Court's jurisdiction in (1903) 28 Bom., 287; (1896) 20 Bom., 596, but not in (1894) 16 All., 231; (1898) 21 Cal., 213; (1898) 25 Cal., 757; (1897) 20 Mad., 89; (1901) P. R., 84; (1905) 29 Bom., 621.

The conflict was set at rest in the C.P.C., 1908, Sch. 11, para. 21, which requires that the objections should be proved.]

[17 Bom. 677]
APPELLATE CIVIL.

The 16th September, 1892.

PRESENT:

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Purushottam Vaman Soman.....(Original Defendant) Appellant
versus
Kashidas Jeychandshet.....(Original Plaintiff) Respondent.*

Khoti lands — Mortgage—Sale in execution of decree on mortgage—Suit for possession by assignee of purchaser at such sale—Consent of khot to alienation.

One Babsha, the registered occupant of certain lands situate in a *khoti* village, mortgaged the lands to one Velji, who got a decree on the mortgage. In execution of the decree the lands were sold to Panachand, who assigned them to the plaintiff. In January 1878, the defendant, as *khot*, took possession of the land, alleging that Babsha had no right to mortgage; that he had left the village and forfeited his occupancy; that he (the defendant) had thereupon rightfully taken possession of the land in 1878, and that the occupancy had been declared forfeited by the revenue authorities in August 1887, under sections 86 and 153 of the Bombay Land Revenue Code, Bombay Act V of 1879. In 1888 the plaintiff brought this suit to recover the lands. The lower Court held that the defendant by accepting rent from the mortgagee was proved to have "consented to the mortgage and its necessary consequences."

[678] On appeal to the High Court,

Held, reversing the decree of the lower Court, that the plaintiff on the strength of his purchase from Panachand in 1887 had no right to eject the defendant.

SECOND APPEAL from the decision of M. P. Khareghat, Assistant Judge of Thana.

Suit to recover possession of certain lands. The lands in dispute were *khoti* lands, of which one Babsha *alias* Babaji Hir Mehtar was the registered occupant. He had mortgaged the lands with possession to Velji, the brother of the present plaintiff. The mortgagee got a decree on his mortgage, and the lands were sold under the decree at a Court sale and were purchased by one Panachand Girdhar, who subsequently assigned his rights under the purchase to the plaintiff. The plaintiff thereupon let out the lands to tenants, from whom the defendant Purushottam Vaman Soman, the *khot* of the village in which the lands were situate, took possession. The plaintiff now sought to recover possession of the lands, alleging that the defendant had illegally taken possession.

The defendant contended that the lands in dispute being *khoti*, the tenant Babsha had no right to alienate them. He alleged that Babsha having left the village for more than twelve years, he (defendant), as *khot*, had applied to Government in the year 1878 to have the lands entered as *khoti khalsa* (lapsed to the *khot*), and that his application having been granted, he had been in possession and enjoyment of the lands as owner, and that he had no knowledge of the decree on the mortgage, nor of the Court sale and purchase thereunder, and that the plaintiff was not entitled to recover possession after the lands had been entered in the Government records as *khoti khalsa*.

The Subordinate Judge (Rao Sahib B. S. Joshi) allowed the plaintiff's claim.

The defendant appealed, but the Assistant Judge confirmed the decree.

The defendant preferred a second appeal.

* Second Appeal, No. 307 of 1891.

Purushottam Parashuram Khare for the Appellant (defendant) :—The Judge found that as we received assessment from the [679] mortgagee Velji, we had consented to the mortgage by Babsha. He held that we had waived our right to object to the alienation by receiving rent from the alienee. We submit that though we received rent from the mortgagee, we never consented to the sale of the property either to the respondent or to his assignor the auction-purchaser. We are, therefore, not bound by the sale. Further, the sale had the effect of forfeiting the occupancy rights of the original tenant, and the lands being entered in the Government records as *khoti khalsa*, we have become their full owner.

The Judge has found that the plaintiff's vendor did not obtain any greater right than the original tenant, and, therefore, he could not further alienate, our consent being only to the first alienation and its necessary consequences. We contend that the sale to the respondent was not a necessary consequence of the original alienation, viz., the mortgage transaction effected by Babsha. It may be that the auction sale to Panachand was the necessary consequence of the mortgage, but the sale by Panachand to the plaintiff was not a further necessary consequence. The appellant is the *khot* of the village, and the lands in dispute were entered in his name, as *khoti khalsa*, in or about the year 1878, while the Court sale was held in January 1886, and the assignment to the respondent is dated February 1887; so neither at the time of the Court sale, nor of the purchase by the respondent, the tenant had any interest in the land. We, therefore, submit that the respondent is not entitled to recover possession.

Narayan Ganesh Chandavarkar for the Respondent.

Candy, J. :—This suit was brought in 1888 for possession of certain lands by plaintiff as assignee from one Panachand, who was the purchaser in a sale in execution of a mortgage decree against Babsha, the registered occupant of the lands in a *khoti* village. Plaintiff alleged that he had let the lands to his tenants, but that the defendant *khot* had wrongfully taken possession in January 1878. Defendant—the *khot*—pleaded that Babsha had no right to mortgage the lands, and that, by leaving the village, Babsha had forfeited his occupancy, and that he (the *khot*) had taken possession in 1878.

[680] The Subordinate Judge found that the plaintiff as purchaser from Panachand (the purchaser at the Court sale) was entitled to bring the suit; that the occupants of *khoti* lands in defendant's villages could "make a transfer of their occupancy rights as by mortgage or sale," and that the lands were not liable to be classed as "*khoti khalsa*," since, though Babsha had left the village, his son was residing there, and the order of the revenue authorities (Exhibit 12) directing the lands to be entered as "*khoti khalsa*" was passed in August 1888, after the institution of the suit. On appeal made by the *khot* to the District Court the Assistant Judge found that there was "not the slightest evidence that any tenant ever claimed to alienate his tenancy as of right and the *khot* consented to such claim, or that he ever led his tenants to expect that he would not contest such a claim. On the contrary his application in 1878 to the Mamlatdar to have the lands given up by tenants transferred to his name (Exhibit 12) shows that he was ready enough to exercise his right whenever opportunity offered." But the Assistant Judge held that the *khot's* consent to the particular alienation in question had been established by the fact that he had allowed the mortgagee to be in possession and had taken rent (assessment) from him for six or seven years. "No doubt" (the Assistant Judge said) "the alienee has no more right than the original tenant, and, therefore, he cannot alienate it further, the consent being only to the first alienation and its necessary consequences."

On second appeal made to this Court by the *khot*, it has been pointed out that on the Assistant Judge's finding the plaintiff is not entitled to succeed; for admitting that the *khot* consented to the particular mortgage by Babsha to Velji (as to which reference may be made to the remarks of this Court in *Nagardas v. Gannu*, P. J. for 1891, p. 107), and that a necessary consequence of that alienation was a suit brought by Velji on the mortgage, and a Court sale, in which Panachand was the purchaser, it was not a further necessary consequence that Panachand should sell his rights to the plaintiff. To this the plaintiff's pleader rejoins that the plaintiff is an undivided brother of Velji, the original mortgagee. This may be so; but the suit was not brought by the plaintiff as [681] mortgagee: the claim is distinctly based on the fact that Panachand had assigned his rights, as Court purchaser, to the plaintiff, and that he (plaintiff) while in possession through his tenants was dispossessed in January 1888. It has now been found by the Assistant Judge that the *khot* took possession of the lands in 1877 or 1878, (and has held possession ever since), and that he then applied to the revenue authorities for the forfeiture of the occupancy (sections 86, 153, Land Revenue Code). It is also clear that the occupancy was declared forfeited to the *khot* in August 1897, before the institution of this suit (not after, as supposed by the Subordinate Judge). Whether Babsha's son resided in the village or not, it is not contended that the registered occupant or any one on his behalf paid or tendered the assessment since 1879. It is thus clear that the plaintiff, on the strength of his purchase from Panachand in 1887, has no right to eject the *khot*. Under these circumstances we must reverse the decree of the Assistant Judge, and reject the claim. All costs on plaintiff throughout.

Decree reversed.

NOTES.

[See also (1905) 30 Bom., 290.]

[17 Bom 681]

APPELLATE CIVIL.

The 20th September, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Mahadu.....(Original Defendant No. 2) Appellant

versus

Lakshman.....(Original Plaintiff) Respondent.*

Jurisdiction—Revenue Jurisdiction Act (X of 1876), Sec. 4 (c)—Mortgage—Suit for redemption—Sale of mortgaged land by Native Chief for arrears of assessment—Purchaser at sale—Claim by purchaser against mortgagor and mortgagee.

* The plaintiff sued to redeem certain land mortgaged by him to the first defendant: The second defendant claimed the land as owner, alleging that the mortgagor and mortgagee had failed to pay the assessment on the land to the Native Chief to whom it was due. The latter had accordingly sold it by public auction to realize the assessment, and he (defendant No. 2) had bought it. The Court of First Instance rejected the plaintiff's claim on the ground that the suit could not be entertained by a Civil Court under the provisions of the Revenue Jurisdiction Act (X of 1876) and the Land Revenue Code (Bombay Act V of 1879).

On appeal the District Court reversed the decree and remanded the case for trial on the merits.

* Appeal No. 22 of 1892.

Held, confirming the order of the District Court, that Government having rendered no assistance in the proceedings for the realization of the revenue by the [682] Native Chief on which the defendant relied, the jurisdiction of the Civil Court was not taken away by section 4 (c) of the Revenue Jurisdiction Act (X of 1876).

APPEAL against an order passed by G. C. Whitworth, District Judge of Nasik.

The plaintiff sued to redeem certain land mortgaged by him to defendant No. 1. Defendant No. 2 was in possession.

Defendant No. 1 (Vithu) answered that the mortgage debt was not paid off, and that a large sum was still due to him.

Defendant No. 2 (Mahadu valad Shama) resisted the claim. He admitted that the land in dispute originally belonged to the plaintiff and had been mortgaged by him to defendant No. 1, but he alleged that they had both failed to pay the Government assessment due to the Chief of Vinchur, who had thereupon sold the land at public auction for the recovery of the arrears of assessment, and that he (defendant No. 2) had purchased it. He, therefore, claimed to hold the land as owner.

The Subordinate Judge rejected the plaintiff's claim on the following grounds :—

"Now the simple question is that whether, after the land has been disposed of for default in payment of arrears of Government revenues thereon by the occupants thereof, can the Civil Court take cognizance in having the land restored to the occupant. My opinion is in the negative. The reasons are that section 4, both paragraphs of clause (c) and last paragraph of clause (f) of the Revenue Jurisdiction Act (X of 1876) prevents Civil Courts from entertaining claims against Government or others for setting aside sales for arrears of land revenue or claims connected with or arising out of any proceedings for the realization of land revenue or respecting the occupation of vacant land. Here, if there is any claim of the plaintiff or defendant No. 1, it is against not defendant No. 2, but against the Vinchurkar Chief, who is not made a party. The Vinchur Chief with respect to the land occupies the same position as the British Government with respect to revenue-paying lands in British India, and as the Collector's proceedings under sections 56 and 57 of the Land Revenue Code (Act V of 1877) could not be taken cognizance of by the Civil Courts, so the Vinchurkar Chief having exercised a similar power [683] under sections 56 and 57 of the Land Revenue Code in respect of the lands in suit for arrears of revenue, the Civil Court cannot take cognizance."

On appeal by the plaintiff the District Court reversed the decree and remanded the case for trial on the merits. The Judge remarked :—

"I think the Subordinate Judge was wrong in regarding the Vinchurkar as standing in the place of Government for the purposes of the Land Revenue Code and the Revenue Jurisdiction Act. If the Vinchurkar was an independent Chief, then Vinchur was not British India, and the Acts named would not apply at all. But it is admitted that the Vinchurkar was the holder of a *saranjam* and exercised both civil and magisterial powers under *sanads* from the British Government, and there is nothing to show that he had higher rights in revenue matters than can be conferred upon holders of alienated villages under the Land Revenue Code. These do not include the power of forfeiture of land. Only forfeiture to Government is recognised (section 153), and Government was not concerned in this matter. If the land was sold for default, it was sold subject to the first defendant's lien; if it was not sold, it is still the plaintiff's, subject to the first defendant's lien."

Defendant No. 2 preferred a second appeal.

Shivram Vitthal Bhandarkar for the Appellant.

Daji Abaji Khare for the Respondent.

Sargent, C. J. :—As it is clear from the judgment of the Subordinate Judge, and it is also assumed by the District Judge, that Government rendered no assistance in the proceedings for the realization of the revenue by Vinchurkar, on which defendant No. 2 relies, we must hold that the jurisdiction of the Civil Court is not taken away by section 4 (c), Act X of 1876. And we, therefore, confirm the order with costs.

Order confirmed.

[684] FULL BENCH.

The 22nd April, and 27th September, 1892.

PRESENT :

MR. JUSTICE PARSONS, MR. JUSTICE TELANG AND MR. JUSTICE CANDY.

Ratulal Rangildas.....Plaintiff

versus

Vrijbhukhan Parabhuram.....Defendant.*

Stamp—Order for payment of money on a person not a banker.

The plaintiff agreed to lend money to the defendant for payment of his trade debts, &c. In pursuance of the agreement the defendant gave his creditors "*chits*" for certain sums. These "*chits*" were addressed to the plaintiff and requested him to pay the amounts mentioned therein. He did so, and now sued for the amount advanced. It was contended by the defendant that the "*chits*" being cheques or bills of exchange were inadmissible in evidence, because unstamped. The Court found that by the agreement the plaintiff was not constituted the defendant's banker within the meaning of clause (6), section 3 of the Stamp Act, 1879.

Held that the *chits* did not require a stamp.

THIS was a reference made by Khan Bahadur Burzorji Edalji Modi, Judge of the Court of Small Causes at Surat, under section 49 of the Indian Stamp Act (I of 1879).

The facts stated in the reference were as follows :—

The plaintiff agreed to lend the defendant money required by the latter for paying his trade debts, &c. In pursuance of this agreement the defendant between the 24th July 1888, and the 5th November 1888, gave "*chits*" to his creditors addressed to the plaintiff. These "*chits*" were all in the following form :—"To Patel Ratulal Rangildas written by Vrijbhukhandas Parabhuram. Give Rs. (stating amount) to (stating name of payee). Dated, &c."

These *chits* were presented to the plaintiff, who paid the amounts mentioned in them, and got a receipt endorsed on the back of each "*chit*."

The plaintiff after giving credit for certain payments brought this suit for Rs. 499. The defendant contended that the "*chits*" were inadmissible in evidence, unless stamped with an anna stamp, as bills of exchange or cheques, and that the duty and penalty could not be accepted under section 34 of the Stamp Act I of 1879.

[685] The Judge submitted the following question for decision :—

"Whether the *chits* are chargeable with a stamp duty of one anna either under article 19 of Schedule I of Act I of 1879 as cheques or under any other provision of the Stamp Act."

The opinion of the Judge was that the "*chits*" were not chargeable with a stamp duty, as they were not cheques.

Telang, J. :—The statement of the agreement in the plaint, as summarized by the Small Cause Court Judge, is very loose, and it is not easy from that statement to make out with precision the relations of the parties as created by that agreement. I think it will be better to ask the Small Cause Court Judge to take evidence as to the nature of the original agreement (which does not appear to be in writing) and certify his finding on such evidence before we express an opinion on the question put. As the matter stands, I am inclined to think that the plaintiff was *not* a 'banker,' and that the *chits* in question need not have been stamped. The plaintiff appears only to have undertaken to lend money as required for the purpose indicated, and that alone can hardly constitute him the defendant's 'banker.'

Birdwood, J. :—I concur in the proposed reference. The following issue might be sent down for trial :—

"Whether the plaintiff was constituted by the alleged agreement the defendant's banker, within the meaning of clause (6) of section 3 of the Indian Stamp Act, 1879?"

Both parties should be allowed to give evidence as to the nature of the agreement, and the finding should be certified within three months.

Sargent, C J. :—I concur.

The case was accordingly sent back, and the finding of the Judge on the above issue was in the negative. The case came again before the Full Bench.

Per CURIAM :—The Small Cause Court Judge having found on the issue in the negative, the answer to this reference must also be in the negative.

Order accordingly.

NOTES.

[See the new definition of '*cheque*' in the Stamp Act, 1899, sec. 2 (7), "*cheque means a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.*"]

[686] APPELLATE CIVIL.

The 27th September, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Rayabai.....Applicant

versus

Sarasvatabai, minor, by her guardian Gangadhar Bhagavant.....Opponent.*

Will—Probate—Application for probate refused by District Court on ground that will not proved—On appeal finding by High Court that the will was proved—Subsequent application for probate to be made to District Court and not to High Court—Practice—Procedure.

Where on appeal from the District Court it was found by the High Court that a will was proved,

Held that a subsequent application for probate should be made to the District Court.

* Civil Application No. 443 of 1892.

THIS was an application against an order passed by Dr. A. D. Pollen, District Judge of Poona.

One Bayabai presented an application to the District Court at Poona to obtain probate of a certain will under Act V of 1881. The District Judge found that the will was not proved and rejected the application. Bayabai appealed, and the High Court reversed the order, holding that the will was proved by the evidence, and directed that probate be granted to her (see Printed Judgments for 1891, page 146).

In pursuance of the High Court's order, Bayabai presented a fresh application to the District Court for the grant of the probate on the 10th February 1892. The application was also rejected by the Judge on the following grounds :

"The application for probate must be made to the Court that ordered the grant of probate. This Court cannot proclaim that the will was proved before it when it has held that the will was not proved. The probate is equivalent to a decree, and when a decree is reversed on appeal by an Appellate Court, it is the Appellate Court that passes a new decree."

Bayabai then applied for probate to the High Court.

Mahadeo Chimnaji Apte for the Applicant.

Sargent, C. J. :—The District Judge objects to issuing a probate, because, he says, he cannot proclaim that the will was proved [687] before the District Court. No doubt the District Court would have to state in the probate that the will was proved before it, but so it must be deemed to have been, after the decision of this Court that it was established on the evidence. In order to execute the order of this Court a probate, [which is not, as the District Judge supposes, a decree of the Court, but "the copy of the will under the seal of the Court" (section 3, Act V of 1881)], has to be prepared and issued, which, under section 583, is the duty of the lower Court. We must, therefore, refuse the application that probate be granted by this Court, and direct the District Judge to grant it.

Application rejected.

[17 Bom. 687]

FULL BENCH.

The 29th September, 1892.

PRESENT :

MR. JUSTICE PARSONS, MR. JUSTICE TELANG, AND MR. JUSTICE CANDY.

Pralhad Lakshmanrav Nikane.....Plaintiff

versus,

Vithu and another.....Defendants."

Stamp—Money-bond—Endorsement of transfer—Sections 13, 14 and 34 of the Indian Stamp Act (I of 1879).

The endorsement of transfer written on a simple money-bond duly stamped requires a stamp, and can be stamped under section 34 of the Indian Stamp Act (I of 1879).

THIS was a reference made by Rao Sahib Sahkaram Mahadev Karandikar, Subordinate Judge of Devgad in the Ratnagiri District, under section 49 of the Indian Stamp Act (I of 1879).

The defendants Vithu and Atma executed a simple money-bond in favour of one Ramshet Vitsket Khadaya, who subsequently transferred his interest in the bond to plaintiff Pralhad Lakshman Nikane. The instrument of transfer was written on the back of the impressed stamp-paper on which the principal bond was written. A question having arisen as to whether the instrument of transfer required to be stamped, the Subordinate Judge submitted the following question for decision :—

"(1) Whether the instrument of transfer on which the plaintiff has sued, can be stamped by this Court as per section 34 of the Stamp Act I of 1879."

[688] The opinion of the Subordinate Judge was in the affirmative.

There was no appearance of parties.

Telang, J. :—It appears to us that the endorsement of transfer in this case cannot be treated as falling within the exemption allowed by the proviso to section 13, which in terms extends only to "any endorsement which is duly stamped or is not chargeable with duty." *Ex concessis* the endorsement in this case is *not* duly stamped and *is* chargeable with duty. It must, therefore, be held to fall under the principal clause of section 13, which forbids a second instrument being written upon a paper on which one instrument has already been written. The second instrument being thus written in contravention of section 13 must under section 14 be deemed to be unstamped. And then section 34 and its provisos, which apply to all unstamped instruments, whether actually or only constructively so, must come into operation. This appears to us to be the true construction of the sections. But in *In the matter of Hanmapa*, I. L. R., 13 Bom., 281, the opinion is expressed that the Collector ought to refuse to stamp the endorsement, because it is made in contravention of section 13. That seems to indicate that in such a case the power to set the matter right by the enforcement of a penalty, as provided elsewhere in the Act, does not apply. As at present advised, we are not prepared to go as far as this. It would be equivalent to adding another sanction to the rule laid down in section 13 besides the sanction provided in section 14. We think that that is not a correct construction of the Act. We have consulted SARGENT, C. J., upon the point, and he authorizes us to say that he agrees in the view now expressed, and that in *Hanmapa's* case, I. L. R., 13 Bom., 281, it was not the intention of the Court to decide the point which has here arisen. The answer to the question put by the Subordinate Judge must be in the affirmative.

Order accordingly.

[689] APPELLATE CIVIL.

The 29th September, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Fardunji Aspandiarji.....(Original Opponent) Appellant

versus

Navajbai.....(Original Applicant) Respondent.*

Letters of administration, grant of—Deceased having no property or fixed place of abode within district—Jurisdiction of the District Judge—Section 240 of the Indian Succession Act (X of 1865).

A District Judge cannot grant letters of administration to a Parsi if the deceased had not at the time of his death a fixed place of abode or any property within his district. See section 240 of the Indian Succession Act X of 1865.

APPEAL from an order of J. B. Alcock, District Judge of Surat.

One Aspandiarji died after making a will of his property bequeathing a legacy to his daughter Jaiji, who had possession of part of his estate at Surat. The will was proved and Jaiji received her legacy. Afterwards Navajbai, widow of Mancherji Aspandiarji (son of the testator), brought a suit against Jaiji in the Subordinate Judge's Court at Surat for the administration of Aspandiarji's estate. Jaiji died pending that suit. Navajbai thereupon presented an application to the District Court at Surat under section 222 of the Indian Succession Act (X of 1865) for the grant to her nominee Thakardas of letters of administration to Jaiji's estate.

The opponent Fardunji Aspandiarji, a brother of Jaiji, contended that the Court had no jurisdiction to grant the application, inasmuch as Jaiji left no property within the jurisdiction of the District Court at Surat, and that she resided at Bombay.

The District Judge of Surat granted the application, observing: "Jaiji had possession of part of Aspandiarji's estate in Surat. She gets nothing under his will except a legacy, which she has received; the will having been proved and the estate administered in Surat. This Court, therefore, has jurisdiction to make an order under section 222."

The opponent appealed against the order.

Govardhanram M. Tripathi for the Appellant:—The application can only be granted under the provisions of section 240 of the Indian Succession Act. Jaiji owned no property of her own at [690] Surat, nor was she a resident there. The mere circumstance that the administration suit is going on at Surat, and that Jaiji was in possession of Aspandiarji's property at Surat, could not give to the District Judge the jurisdiction to entertain the application for administration to Jaiji's estate.

Manekshah J. Taleyarkhan for the Respondent.

Sargent, C. J.:—The Court of Surat, in which the suit to administer the estate of Aspandiarji has been brought, had no jurisdiction to grant administration of Jaiji's estate. Section 222 of Act X of 1865 enables the plaintiff to apply for the issue of letters of administration to his nominee; but the Court, to which such application had to be made, was the Court as determined by

section 240, and as Jaiji had not "a fixed place of abode, nor owned property," within the district of the District Judge of Surat at the time of her death, that Court had no jurisdiction to grant the letters of administration asked for.

We must, therefore, discharge the order appealed from, but without costs
Order discharged.

[17 Bom. 690]
 FULL BENCH.

The 6th December, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, MR. JUSTICE PARSONS
 AND MR. JUSTICE TELANG.

Gadadhar Bhat.....(Original Plaintiff) Appellant
versus

Chandrabbagabai.....(Original Defendant) Respondent.

*Hindu law—Inheritance—Moveable property—Daughter-in-law inheriting
 moveable property from father-in-law—Estate taken by her in such
 property—Widow—Widow's estate in moveables—No
 power to dispose by will of moveables.*

Where a son predeceased his father, and the son's widow subsequently succeeds to her father-in-law's property as his heir, she takes the same estate in it as she does in property inherited by her from her husband.

Under the law of Mitakshara a widow has no power to bequeath moveable property inherited by her from her husband.

In the Presidency of Bombay, moveable property inherited by a widow from her husband devolves on her death to her husband's heirs.

If the decision of *Damodur v. Purmanandas*, I. L. R., 7 Bom., 155, is to be regarded as necessarily giving to the heir of a widow on her death such moveable property inherited from her husband as remains undisposed of by her, it must be treated as of no authority.

[691] THIS was a first appeal from the decision of Rao Bahadur Naro Mahadeo Thosar, First Class Subordinate Judge of Ahmednagar.

The plaintiff, Gadadhar Bhat, sued to recover the property of his paternal uncle Bhatam Bhat Sakharan (see the genealogy given below in the judgment of JARDINE, J.), who died in 1881. Bhatam Bhat had a son named Kashinath, who predeceased his father, having died childless in 1878. He left a widow named Vithabai, who on Bhatam's death in 1881 took possession of his property and remained in possession until her death in 1887. On her death her sister, the defendant Chandrabbagabai, took possession, claiming it under the will of Vithabai. The plaintiff now sued for this property, claiming it as the heir of Bhatam.

The Subordinate Judge found that the plaintiff was the heir of Bhatam and that the will of Vithabai was invalid as to the immoveable property, but valid as to the moveable property.

The plaintiff appealed.

In appeal the case came before JARDINE and PARSONS, JJ., who referred the following question to a Full Bench :—

"Whether under the law of the Mitakshara, Vithabai had power to bequeath to the defendant by her will moveable property inherited by her from her husband."

In referring the case the Judges stated their opinion as follows :—

JARDINE, J. :—This appeal is made by the plaintiff from an original decree of the Subordinate Judge of the First Class at Ahmednagar. The plaintiff claimed certain ancestral moveable and immoveable property from the defendant, alleging that he was entitled as heir of Bhatam Bhat. The defendant pleaded title under the will of her sister Vithabai, the deceased widow of Kashinath, the son of Bhatam Bhat, who survived Kashinath. Kashinath seems to have left no issue. The relationships are shown in the following table :—

[692] Meghasham Bhat

Ramchandra

Nana

Gadadhar Bhat
(plaintiff)

Sakharam

Bhatam Bhat
died 1881

Kashinath died 1878,
leaving widow Vitha-
bai, who died 1887.

The Subordinate Judge found that the plaintiff was not united in family with Bhatam Bhat; that on the death of Vithabai he was the proper heir of Bhatam Bhat; that the will purporting to be made by Vithabai was proved; that it was invalid as regards the devise of the immoveable and valid as regards the bequest of the moveable property.

The only question argued before us, in appeal, is one of law, namely, whether Vithabai had power to bequeath the moveable property, which includes some bonds that have come into the defendant's possession.

The reasons for this part of his decision are recorded by the Subordinate Judge as follows :—"Bhatam Bhat had only a money interest in the property taken in mortgage. So what he left to his daughter-in-law, Vithabai, was simply a money interest,—that is, so much money converted into a mortgage-right shape. So these mortgage-bonds as well as the other moveable property, consisting of ornaments and simple money bonds, were a sort of property which I regard Vithabai as competent to devise in favour of the defendant. If she had disposed of this property in her lifetime, I think no one could have questioned her competency to do so. If this was the case in her lifetime, I think the same may be said to hold good after her death."

Mr. Jardine contended for the appellant that moveable property inherited by a widow from her husband's family is not *stridhan*, and, therefore, is not her absolute property to dispose of as she pleases by will. Mr. Branson argued the contrary of these propositions on behalf of the respondent. In dealing with the authorities, some of which are collected in the judgment of [693] Mr. Justice SCOTT in *Damodar v. Purmanandas*, I. L. R., 7 Bom., 155, Mr. Jardine conceded that moveable property taken by a widow under gift or will of the husband is *stridhan*, and at the widow's disposal, and that the above decision was right as regards the property in suit before Mr. Justice SCOTT, which had come to the widow by bequest of her husband, but he contended

that the learned Judge went too far in the *obiter* remark at p. 164, that "the resume of recent decisions shows a consensus of authority deciding that a widow may deal absolutely with moveables *inherited* from her husband."

Mr. Jardine began by citing the authority of Mr. Mayne, section 370 Mayne's Hindu Law (5th Ed.), which quotes three cases out of 1 Borradaile—*Chooneelal v. Jussoo*, 1 Bor., 60; *Dhoolubh v. Jeevee*, *ibid.*, 75; *Umroot v. Kulyan das*, 1 Bor., 314,—and *Venkata Rama v. Venkata Suriya*, I. L. R., 2 Mad. P. C., 333, for the following statement:—

"A married woman may make a will of her *stridhana* or any other property which is absolutely at her own disposal. But she cannot devise property inherited from males, since her interest in it ceases at her death."

Mr. Mayne's views are more fully stated in Chap. 20 about Woman's Estate where the definition of *stridhan* in the Mitakshara is fully discussed. In s. 567 he comes to the power of a widow over moveables, and in s. 598 observes, in conclusion, as follows:—

"Whenever the question arises for final decision, it will be well to bear in mind the observations of the Judicial Committee in *Bhugwandeem v. Myna Bae*, 11 M. I. A., 510—514; s. c. 9 Suth. (P. C.), 23. These show that the text which authorise a woman to dispose absolutely of moveable property *given* to her by her husband are different from those which control her disposition of property *inherited*, and that she may probably have larger powers over the former than over the latter. Also, that reliance can no longer be placed upon the much canvassed text of the Mitakshara (ii 11, s. 2), as raising any [694] analogy between property inherited by a woman and her *stridhanum*, as regards her right to dispose of it."

The rulings referred to are those mentioned in s. 567 at p. 706, *Thakoor v. Rai Baluk Ram*, 11 M. I. A., 139, 173, *Bhugwandeem v. Myna Bae*, 11 M. I. A. 487, 509, *Collector of Masulipatam v. Cavalry Vencata*, 8 M. I. A., 529, *Keerut v. Koolahul*, 2 M. I. A., 331. To the above I would add *Muttu Vaduganadha v. Dora Singa*, L. R., 8 I. A., 99 at pp. 108-109; s. c. I. L. R., 3 Mad., 290. See the passage at pp. 108, 109, quoted in *Jankibai v. Sundra*, I. L. R., 14 Bom. at p. 621.

Mr. Branson, however, relies on the views expressed in *Vijiarangam v. Lakshuman*, 8 Bom. H. C. Rep., 244, pp. 260, 271, (O. C. J.), by Mr. Justice WEST that all property acquired by a woman by inheritance is classed by the Mitakshara as *stridhan*. On this subject I will presently refer to the discussion by the Full Bench in *Bhagirthibai v. Kahnajirav*, I. L. R., 11 Bom., 285, and the interpretation of that decision in *Jankibai v. Sundra*. However, it does not follow, as a consequence from the property being *stridhan*, that the widow has unrestricted power to alienate. At p. 266 of the report of *Vijiarangam*' case, WEST, J., says: "A widow may dispose as she pleases of property as to which this power is expressly conferred, but to recognise inherited property as part of her *stridhan* by no means involves the consequence that she can alienate it without good reason." See West and Bühler, 317 to 322, for this discussion and cf. s. 584, Mayne's Hindu Law. The same reasoning was also applied to the devolution, on the death of the widow, of moveables inherited from the husband and treated as *stridhan* in *Harilal v. Pranvalavdas*, I. L. R., 16 Bom., 229, by SARGENT, C. J.

The earlier cases in Borradaile's Reports are not of much importance as authorities; they are reviewed in *Bhagirthibai*'s case, I. L. R., 11 Bom., at p. 298. In the case of *Pranjivandas v. Devkuvarbai*, 1 Bom. H. C. Rep., 130, O. C. J., which arose in the Island of Bombay, Sir M. SAUSSE, Chief Justice of the Supreme Court, comes to the following conclusion:—"On the [695] whole,

the spirit and practice of Hindu law, as recognised in Western India, be best construed by treating the widow as having uncontrolled power over moveable estate." In *Vinayak v. Lakshmibai*, 1 Bom. H. C. Rep., at 124, O. C. J., that Chief Justice says the above decision was passed after lengthened consideration of all the accessible authorities, and that the doctrine about daughters was mainly based on the authority of the Mayukha. The case of *Bechar v. Bai Lakshmi*, 1 Bom. H. C. Rep., 56, A. C. J., was from Gujarat. It came before FORBES, ERSKINE and WESTROPP, J.J. They were "of opinion that the Hindu law existing on this side of India gives a widow absolute power over the moveable property of her deceased husband which has been inherited by her." In *Lakshmibai v. Ganpat*, 4 Bom. H. C. Rep., 162, O. C. J., ARNOULD, J., decided that the widows of separate Hindus who died without male issue are entitled, as heirs, *absolutely* to their husbands' shares of the moveable property. The case arose in this island.

The above decisions are those in which the present question has been actually decided in the Courts of this Presidency. In other cases there are *dicta* on which Mr. Branson relies. In *Balvantrav v. Purshotam*, 9 Bom. H. C. Rep., at p. 111, where the Full Bench decided a question of limitation, they say: "The widow in this Presidency takes a limited estate only in the immoveable property of her childless husband, or son, but she takes his moveable estate absolutely—*Bechar v. Bai Lakshmi*, 1 Bom. H. C. Rep., 56, A. C. J.; *Vinayak v. Lakshmibai*, 1 Bom. H. C. Rep., at p. 124, O. C. J.; *Pranjiundas v. Devkuvarbai*, 1 Bom. H. C. Rep., 130, O. C. J.; *Chandrabhagabai v. Kashinath*, 2 Bom. H. C. Rep., 323." In the case of *Mayaram v. Motiram*, 2 Bom. H. C. Rep., 313, immoveable property only was in suit. So in *Tuljaram v. Mathuradas*, 1 L. R., 5 Bom., 662, the question before the Court related only to immoveable property received by a widow in gift. The following passage in WESTROPP C. J.'s judgment at p. 670 seems not to have been required for the decision of the case:—"Here in this Presidency, the widow, who as such takes the property of her husband dying without leaving male issue and separated from his kinsmen, is, except for certain limited purposes, restrained from alienating such portion [896] of that property as is immoveable. In it she has only an estate *durante viduitate*, but she is entitled to his moveable estate absolutely—*Pranjiundas v. Devkuvarbai*, 1 Bom. H. C. Rep., 130, O. C. J.; Mayukha, Ch. IV, s. 8, pl. 3, 4; see also 8 Bom. H. C. Rep. at p. 156, O. C. J.; 4 Bom. H. C. Rep. at p. 163, O. C. J.; and 6 Bom. H. C. Rep., p. 1; Act XV of 1856, s. 2."

The next case is that of *Damodar v. Purmanandas*, 1 L. R., 7 Bom., 155, decided by SCOTT, J., in 1883. The *dictum* already quoted is *obiter* as regards *inherited* moveables. The learned Judge expressly says that the question of law before him related to property left to the widow by her husband's will. The following authorities which he cites deal with wills and gifts:—*Koonjbehari Dhar v. Premchand*, 1 L. R., 5 Cal., 684; *Venkata Rama v. Venkata Suriya*, 1 L. R., 1 Mad., 281, and in the Privy Council on appeal 1 L. R., 2 Mad., 333; *Vyavahara Mayukha*, Ch. IV, s. 10, pl. 9. The following, which he also cites, relate to property inherited, and the last of the three is *obiter*—*Bechar v. Bai Lakshmi*, 1 Bom. H. C. Rep., 56, A. C. J.; *Pranjiundas v. Devkuvarbai*, 1 Bom. H. C. Rep., 130, O. C. J.; and *Balvantrav v. Purshotam*, 9 Bom. H. C. Rep. at p. 111. The text of *Katyayana*, which SCOTT, J., restricts to immoveables, "certainly includes both moveable and immoveable property" according to the Privy Council in *Bhugwande's* case, 11 M. I. A., at p. 511, and has since been interpreted to include moveables by TURNER, C. J., and MUTTUSAMI, J., in *Narasimha v. Venkataswami*, 1 L. R., 8 Mad., 290, who at p. 292 also observe

that "in Vyavahara Mayukha, Ch. IV, s. 8, sloka 4, Katyayana's text is expressly stated as applying to moveable and immoveable property." Mr. Justice SCOTT also quotes some decisions of the Privy Council. To meet Mr. Mayne's argument in s. 598, he remarks that the Judicial Committee strictly limited their decision in *Bhugwandeem's* case to the cases governed by the Benares School, and he quotes the well-known remark in *Thakoor v. Rai Baluk Ram*, 11 M. I. A., at p. 175, that "the result of the authorities seems to be, that although according to the law of the Western Schools the widow may have the power of disposing of moveable property inherited from her husband, which she has [697] not under the law of Bengal, she is by the one law, as by the other, restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband."

This quotation fitly leads to a discussion of the Privy Council cases to which I now turn. At p. 174 of the same Report, their Lordships say generally that there are many cases to "show that, according to the Benares and other Western Schools, the power of a widow over property inherited from her husband is limited, and that on her death it passes to his heirs." In interpreting the *Mitakshara*, Ch. II, s. 11, pl. 2, their Lordships exclude the widow's inherited property from *peculium* or *stridhan* proper. This judgment and the two cases mentioned in it and *Bhugwandeem's* case are the basis of the statement of Mr. Mayne, which, as regards immoveables, I take to be correct (s. 567) that it is thoroughly settled that a widow takes only a restricted estate, and that at her death it passes to her husband's heirs.

In *Bhugwandeem's* case, 11 M. I. A., at p. 511, decided in 1867, the Judicial Committee interpret the meaning of the word *stridhan* and define the widow's power of disposal. After alluding to the *Mitakshara* and discussing the texts of Nareda and Katyayana found in Colebrooke's Digest, Texts 476-477, they say that "the preponderance of authority is certainly in favour of the proposition that, whether the widow has or not the power to dispose of inherited moveables, they as well as the immoveable property, if not disposed of, pass on her death to the next heirs of the husband." At p. 512 it is remarked that "both the Vivada Chintamani and the Mayukha confine *stridhan* within the definitions of Manu and Katyayana. They exclude property inherited and the other acquisitions which are comprehended in the last clause of the paragraph of the *Mitakshara*, but are excluded by Sir W. Macnaghten." At p. 513 the opinion is expressed that "the reasons for the restrictions which the Hindu law imposes on the widow's dominion over her inheritance from her husband whether founded on her natural dependence on others, her duty to lead [698] an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property, invested so as to yield an income, as they are to land. The more ancient texts importing the restriction are general. It lies on those, who assert that moveable property is not subject to the restriction, to establish that exception to the generality of the rule." These remarks were apposite to the decision as regards the moveable property in suit.

There are some decisions of the Privy Council which are not noticed by Mr. Justice SCOTT. In *Chotay Lall v. Chunnoo Lall*, L. R., 6, 1 A., 15, the Bombay cases were reviewed by the Judges at Calcutta, and the different views held by Sir J. ARNOULD in *Bhaskar v. Mahadev*, 6 Bom. H. C. Rep., 1 O. C. J., and by Mr. Justice WEST in *Vijjarangam's* case, 8 Bom. H. C. Rep., 244, O. C. J., which is treated as decided on the Mayukha, are considered. At p. 31, the Privy Council say of the daughter's estate: "No doubt in the Courts of

Bombay there have been rulings and *dicta* in favour of the view that she takes the entire property. Their Lordships do not think it necessary, especially after their own decisions as to widows' estates, to go into an examination of the Indian cases."

Muttu Vaduganadha's case, L. R., 8 I. A., 99, related, like the last, to the nature of a daughter's estate inherited from her father. The Privy Council deal with the passage of the Mitakshara about *stridhan*, Ch. II, s. 11, pl. 2, and say, p. 108, 'it is impossible to construe it as conferring upon a woman taking by inheritance from a male a *stridhan* estate transmissible to her own heirs.' They say of the cases of *Thakoor Deyhee*, *Bhugwandeem* and *Chotay Lall*, that all these cases were governed by the Mitakshara law. *Bhugwandeem's* case is treated by the Calcutta Judges as authority that a Hindu widow under that law has no power to alienate the moveable estate inherited from her husband, to the prejudice of his heirs—*Sheelochun Singh v. Saheb Singh*, I. L. R., 14 Cal., at p. 390.

In discussing *Chotay Lall's* and *Muttu Vaduganadha's* cases in *Jankibai's* case, I. L. R., 14 Bom., at p. 622, I remarked that they were not Bombay cases, and that their Lordships interpreted the Mitakshara without [699] using the Mayukha, as it may be assumed they would if they had been declaring the law of this Presidency. In the present judgement I have pointed out that in *Bhugwandeem's* case they did resort to the Mayukha as well as to Katyayana and Nareda. Mr. Justice SCOTT in *Damodar's* case says he follows the Mayukha and he cites Ch. IV, s. 10, pl. 9, which relates to gifts only. What he cites is a text of Nareda, but he does not notice the comment of the Privy Council on the very same text in *Bhugwandeem's* case, 11 M. I. A., at pp. 510 and 511, which confines that text to gifts and expressly excludes inheritance.

The present case comes from Ahmednagar, where the law is based on the Mitakshara, and the Mayukha may be used in construing the Mitakshara, though the Mayukha has not the special and almost paramount authority it has acquired in Gujarat—*Bhagirthibai's* case, I. L. R., 11 Bom., at p. 294. The Mayukha is only a secondary authority in the Maratha country—West and Bühler, p. 10. It serves to illustrate and supplement the Mitakshara there. But it may be followed so far only as its doctrines do not stand in opposition to its express precepts or to the general principles of the Mitakshara—*Jankibai's* case. This consideration diminishes the weight of *Pranjivan v. Devkuvarbai* and *Damodar v. Purmanandas* as well as of cases decided on the law of the Island of Bombay and other regions where the Mayukha has special authority. It also detracts from the value of *dicta* of distinguished Judges when based on the Mayukha, as in *Tuljaram v. Mathuradas*. The decision in *Bhugwandeem's* case, which SCOTT, J., confines to the Benares School, is really an interpretation of the Mitakshara after some consideration of the Mayukha, and has been applied by the Privy Council to cases arising in the Madras Presidency.

It becomes, therefore, an important question whether the supposed weight of authority is sufficient to require this Court to adhere to the Bombay decisions rather than follow those of the Privy Council as regards cases governed, as this is, by the Mitakshara. Now, of the three cases in which the Supreme Court and the High Court have actually decided the question before us, two arose in this island and the other in Broom. The *dicta* in the [700] three other cases where the question was not before the Court, viz., *Balvantrav v. Purshotam*, *Tuljaram v. Mathuradas* and *Damodar v. Purmanandas*, are substantially based on these Mayukha cases. *Vijiarangam's* case was decided on the Mayukha, and all that WEST, J., said therein about the Mitakshara is treated as *obiter* by COUCH, C. J., and AINSLIE, J., in *Chotay Lall's* case, and as like *Devkuvarbai's*

case, a decision on the Mayukha. Sir R. COUCH treats the opinion expressed by WEST, J., as opposed to that of Sir J. ARNOULD and contrary to the decision of the Privy Council in *Bhugwandeem's* case, and adds: "He argues, as I understand him, that this case was not rightly decided." I lay stress on these words of so eminent a Judge as Sir R. COUCH, because they show that he was not prepared to accept the *dicta* of Judges however learned, when they conflicted with the interpretations of the Mitakshara by the Privy Council. In *Jankibai's* case, I have expressed my belief that the remark of the Privy Council at p. 32 of the report of *Chotay Lall's* case referred to *Vijarangam's* case, namely, that the Bombay case most relied upon was governed by the law of the Mayukha. As pointed out in *Jankibai's* case (p. 618), SARGENT, C.J., in *Dalpat v. Bhagvan*, I. L. R., 9 Bom., 301 at p. 303, treats the decision on the Mayukha as to the *stridhan* including inherited property in *Vijarangam's* case as reopened by the decision of the Privy Council in *Muttu Vaduganadha's* case. See MAYNE'S Hindu Law, s. 576. The above observations of the Judicial Committee, by whose decisions we are bound, confining one of the most carefully considered Bombay cases to the Mayukha, seem to me to neutralize to a large extent those of the Judges of this Court who have confined the decision in *Bhugwandeem's* case to the Benares School. Doubtless we must give due weight to the rule *stare decisis*, but the question remains to which?—those of the Privy Council directly interpreting the Mitakshara, or those of this Court applying the peculiar law of the Mayukha? Whether there has been a long course of decisions operating outside this island and the other regions governed by the Mayukha, I am unable to pronounce. None have been shown to us. Those mentioned in the two digests of unreported decisions appear to relate to immoveables. *Bai Jamna* [701] v. *Bhaishankar*, I. L. R., 16 Bom., 233, decided by BIRDWOOD and PARSONS, J.J., quotes *Damodar v. Purmanandas* with approval as stating the law about inherited moveables disposed of during the widow's life-time, but does not apply that doctrine to the widow's bequest by will of inherited moveables, and on the contrary follows *Thakoor Deyhee's* and *Bhugwandeem's* cases on that point.

The three rulings, as already remarked, are under the Mayukha Law; the three *dicta* are substantially based on Mayukha cases. So was *Vijarangam's* case; and there Mr. Justice WEST says the consequence does not follow, from his view of the extent of the term *stridhan*, that the widow has unrestrained power of disposal, p. 269. Thus he limits the words "absolute estate."

It was after the decision in *Dalpat v. Bhagvan* in this Court and of *Chotay Lall's* and *Muttu Vaduganadha's* by the Privy Council that *Bhagirathibai v. Kahnajirav*, I. L. R., 11 Bom., 285, came before a Full Bench of this Court consisting of SARGENT, C. J., WEST and BIRDWOOD, J.J. In *Jankibai's* case, where I sat with BIRDWOOD, J., I gave my reasons, p. 623, for treating the decision as substantially based on the Mitakshara, the Mayukha being used where it does not conflict as a secondary authority. The Full Bench consider the Privy Council rulings. At p. 617, I personally express the opinion that we must take the decision "as settling that in this Presidency, whether under the Mitakshara or the Vyavahara Mayukha, a daughter inheriting from her father takes an absolute and not a life estate. We may also, I think, take the case as an authority for holding that the daughter took the estate as *stridhan* in some sense of the word." At p. 620 I quote this sentence from the Full Bench judgment—

"If the daughter takes an absolute estate, it has been understood she must, in the absence of an express rule to the contrary, transmit it to her own heirs." Then I add: "The implication seems to be that the establishment of the proposition, that the daughter takes an absolute estate, establishes also two

other propositions, namely, that the property is *stridhan* and that it descends as such. But see Tagore Law Lectures, 1878, page 302."

[702] If I am right in this remark, the question whether the property inherited by Kashinath's widow in the case before us is *stridhan* in the narrow and technical sense as in the Mayukha Ch. IV, s. 10, pl. 1, 2, or in its etymological and larger sense as in the Mitakshara, Ch. II, s. 11, pl. 3 and 4, is of less consequence in dealing with the Full Bench decision. So far as the present question is analogous, the first requirement is to show that the widow took an "absolute estate." That being proved, the Bench would have held it to be *stridhan*; and I think Mr. Branson's argument is inverted and is opposed to authority when he contends that if the property is *stridhan* then the widow has unrestricted power of disposal. It is true that the Full Bench judgment discusses with approval, (pp. 293—311.) *Devkuvarbai's* case as to power to alienate. But as I understand the judgment, this point, *viz.*, the widow's power to alienate, was not the question referred or decided. On considering the reference and arguments, as well as the language of the judgment, I come at length to the opinion that the question whether a daughter inheriting from her parents takes an absolute estate, means whether it descends to her heirs, and not to those of her father. At p. 309 the learned Judge says: "The completeness of a woman's estate in property taken by inheritance does not necessarily involve complete independence in dealing with it. The Mitakshara is careful to demonstrate that dependence is as consistent with full ownership in the case of a woman as of a child, and it seems likely that Vijnaneshvara looked to this dependence as a safeguard for the enlarged estate which he assigned to women." This view of Mr. Justice WEST's language is that which consists with what he said in *Vijayarangam's* case. At p. 310 he says that "the subjection of a woman to restrictions on alienation is quite consistent with full ownership in her." I may here observe that Dr. Jolly, while affirming WEST, J.'s view as to what the Mitakshara includes in *stridhan* as against Mr. Mayne (Tagore Law Lectures, 1873, p. 243), concludes his history of Female Property with the statement that the Mitakshara School has, by putting restrictions on dominion, removed the consequences of that identification of *stridhan* with woman's property in general. He also points out that there is [703] no authority for observing in Bombay and South India the distinction found in the law of Mithila between moveable and immoveable property inherited by a widow. He discusses the Mayukha, pp. 252—259, and says: "It may be confidently asserted, therefore, that there is no more reason for observing this distinction in regard to property inherited from males in Bombay and South India, where this point seems to be still open to question, than in Bengal and Benares, where the non-existence of such a distinction as this has long been settled by authority." The above impairs SCOTT, J.'s remark, so far as it relates to the question of inherited moveables, about the commentators being all of one opinion. So also do the decisions in Bengal and the more recent in Madras. *Narasinha v. Venkatadri*, I. L. R., 8 Mad., 290, decided in 1884 is an interpretation of the Mitakshara, as to moveables inherited from a husband, by the light of the Mayukha and the southern authorities. It does not, however, notice the Bombay rulings and *dicta*. The learned Judges say: "The Mitakshara doctrine seems to be that the widow has a complete vested ownership, as contra-distinguished from a mere right to use, though her power over it to make a gift or sale at her pleasure is restricted by express texts. Hence those who considered the text of Katvayana to be applicable only to immoveable property doubted whether the widow was precluded from alienating moveable property. Having regard, however, to the extent to which the widow's power

of disposition is treated, as restricted in the leading commentaries in the south, there appears to be little or no difference in the result. Hence the Judicial Committee observed in the *Collector of Masulipatam v. Kavali* that the restrictions on the widow's power of alienation are of the very substance of her heritage. Assuming for a moment that she has a large power over moveable than over immoveable property, it can by no means be larger than that possessed by the father of a Hindu family under the text of Yajñavalkya cited in Mitakshara, Ch. I, sec. 1, sl. 27. It is observed by Mr. Mayne in section 229 that the power must generally be taken to be limited to such necessary or suitable purposes as would come within the ordinary power of the head of a household. We should prefer to say [704] that the nature of moveable property being such that in many cases conversion is essential to its enjoyment, the widow is not precluded from converting it, but must preserve the capital, unless the expenditure of it is necessitated by the insufficiency of the income to provide for her maintenance, subject, nevertheless, to a power to dispose of a moderate portion for works of piety. - *Narasinha v. Venkatasri*, I. L. R., 8 Mad., 290.

It may be noted, in passing, that the Privy Council decision in *Lakshman Dada Naik's case*, I. L. R., 5 Bom., 48, and *Gurur Reddi v. Chinnama*, I. L. R., 7 Mad., 93, were cited to us by Mr. Apte for the appellant as to the fathers' power to alienate by will.

The present case has been argued substantially on the judicial authorities, and I do not think it necessary now to enter on examination of the texts of Hindu law. As regards the authorities, it appears to me that the solution of the question of the widow's power of alienation does not depend so much on the definitions of *stridhan* as on the reasons of the Hindu law, restricting the widow's dominion. These are given by the Privy Council in *Bhugwandeem's case* and elsewhere. The Privy Council rulings are based on the Mitakshara. The three Bombay rulings are based on the Mayukha. They deal more with the definition of *stridhan* and less with the restrictions on dominion. The various *dicta* are supported substantially by these rulings on the Mayukha, and though most of these *dicta* on the point before us are deliberate and well considered opinions, yet they as well as the rulings have been questioned in other Courts. I do not consider the question about inherited moveables to be so firmly settled by the Bombay decisions as to require us to follow the current. It has always been met by the opposing current of Privy Council decisions. As pointed out by Scoble *arguendo* in *Vijarangam's case*, some of the authorities are remarks of a single Judge. The case of *Narasinha v. Venkatasri*, I. L. R., 8 Mad., 290, and Dr. Jolly's lectures have seen the light since Mr. Justice SCOTT decided *Damodar's case*. The books show that the question has always been one in debate. I do not think it is touched by the Full Bench decision in *Bhagirathibai's* [705] case, which I may remark was not quoted before us. The inclination of my own views is to follow the Privy Council in *Bhugwandeem's case*. I say this on the assumption that, in cases falling under the Mitakshara law, no fixed doctrine has been established on the faith of which property has passed, and a practice grounded. The question is certainly one of general importance, and considering the opinions expressed and the rulings passed in this Court and the Supreme Court, some of them by Full Benches, in favour of the widow's power to dispose as she pleases of moveable property inherited from the husband, I am now of opinion that we should now refer to a Full Bench the following question :—

Whether, under the law of the Mitakshara, Vithabai had power to bequeath to the defendant by her will moveable property inherited by her from her husband?

Parsons, J.:—I concur in the proposed reference. Assuming that Vithabai had power to dispose of the moveable estate in suit in her life-time, it does not, I think, follow that she could dispose of it by will. In my opinion, she could not, for at the moment of her death the estate would vest in the heirs of her husband, and no estate of hers would remain to pass under the will. In the case of *Bai Jumna v. Bhaishankar*, P. J., 1891, p. 77; I. L. R., 16 Bom., 233, BIRDWOOD, J., and myself held that "there is a difference between property inherited by a woman from her husband and property acquired by her as *stridhan*. Both may be called *stridhan*, but that only can legally be held to be her personal property which is such at the time of her death, and passes as such to her own heirs." As, however there are decisions of this Court now brought to our notice which imply the power to a widow to dispose by will of such property, the point is one that ought to be determined finally by a Full Bench.

The case being thus referred, it came on for argument before a Full Bench consisting of SARGENT, C.J., and PARSONS and TELANG, JJ.

Jardine (with *Mahadev Chimnaji Apte*) for the Appellant (plaintiff).—Under the Mitakshara, which is the paramount authority in the Deccan, a Hindu widow has no power to alienate moveable property which she has inherited from her husband. Even a Hindu father, whose rights under the Hindu law are more extensive than those of a widow who merely gets a life estate, is not entitled to dispose of all ancestral moveables—*Lakshman Dada Naik v. Ramchandra Dada Naik*, I. L. R., 5 Bom., 48. Though a widow may alienate moveables inherited by her from her husband or his relatives during her life-time, she cannot do so by will; her power of disposition comes to an end at her death. Property inherited by a widow in her husband's family is not her *stridhan*—Mayne's Hindu Law (4th Ed.), sec. 370; *Choonilal v. Jussoo*, 1 Bor., 60; *Dhoolubh v. Jeevee*, *ibid.*, 75; *Umroot v. Kalyandas*, *ibid.*, 314; *Venkata Rama v. Venkata Surra*, I. L. R., 2 Mad., P. C., 333; *Narasinha v. Venkutadri*, I. L. R., 8 Mad., 290; *Bhugwandeem v. Myna Baee*, 11 Moo. I. A., 487; *Sheolochan Singh v. Sahab Singh*, I. L. R., 14 Cal., 387; *Harilal v. Pranvalaldas*, I. L. R., 16 Bom., 229. See also *Isri Dut Koer v. Hansbutti Koerain*, I. L. R., 10 Cal., 324; *Gurjiv Keddi v. Chinnamma*, I. L. R., 7 Mad., 93; *Mussumat Thakoor Deyhee v. Bai Baluk Ram*, 11 Moo. I. A., 139, and *Chotay Lall v. Chunnco Lall*, I. L. R., 6 I. A., 15.

Gangaram B. Rele for the Respondent (defendant): In Western India a widow has power to alienate moveable property inherited by her in her husband's family—*Bhugwandeem v. Myna Baee*, Moo. I. A., at p. 510. It has been an established rule that a Hindu widow can dispose of movables during her life-time, and such disposition cannot be impugned after her death. If a widow has got absolute power during her life-time, why should she not have the power to dispose away by will? To say that she cannot do so by will, though she is the absolute owner during life-time, would be to restrict her power, and the two positions would be conflicting. There is no direct ruling that a widow can devise away by will moveable property inherited from her husband, but such disposition would seem to be merely an exercise of her acknowledged absolute right, and it is reasonable to infer that she has the power which is consistent with that right—*Bechar Bhagavan* [707] v. *Bai Lakshmi*, 1 Bom. H. C. Rep., A. C. J., 56; *Vinayak Anandray v. Lakshumbai*, *ibid.*, 117; *Pranjivandas v. De. Kuvarhar*, *ibid.*, 130; *Mayaram v. Motiram*, 2 Bom. H. C. Rep., A. C. J., 313; *Chandrabhagabai v. Kashinath*, *ibid.*, 323; *Lakshumbai v. Ganpat Moroba*, 4 Bom. H. C. Rep., O. C. J., 150; *Bhaskar Trimbak v. Mahadeo Ramji*, 6 Bom. H. C. Rep., O. C. J., 1; *Vijiarangam v. Lakshman*, 8 Bom. H. C. Rep., O. C. J., 244; *Balvantrao v. Purshotam*,

9 Bom. H. C. Rep., 99; *Tuljaram v. Mathuradas*, I L. R., 5 Bom., 662; *Damodar v. Parmanandas*, I. L. R., 7 Bom., 155; *Bhagirathibai v. Kanhujirao*, I. L. R., 11 Bom., 285; *Harilal v. Pranvalaldas*, I. L. R., 16 Bom., 229; West and Bühler, pp. 312, 314, 317.

Sargent, C.J.:—As Kashinath predeceased his father, Bhatam Bhat, Vitha's title to succeed was as daughter-in-law, to Bhatam Bhat, and, as she was introduced into the family by marriage, she could not, on any rational principle, take a different estate from that to which she would have succeeded had her husband survived him. See the remarks of WESTROPP, C.J., in *Tuljaram Morarji v. Mathuradas and others*, I. L. R., 5 Bom., at p. 670. It becomes, therefore, necessary to consider what is the estate a widow takes in the moveable property which she inherits from her husband. Before proceeding to consider the authorities in this Court, it will be convenient to refer to certain important judgments of the Privy Council on the subject.

In *Bhugwandeem Doobey v. Myna Bae*, 11 M. I. A., 487, the question was (see p. 495), whether, according to the law of the Benares School, a Hindu widow is competent to dispose, by will or deed of gift, of either moveable or immoveable property, inherited from the husband to the prejudice of her next heirs—and their Lordships, after referring to the decisions in the High Courts of Madras and Bombay, in which a distinction was said to have been drawn between moveable and immoveable property and pointing out that the authorities upon which that distinction is based were not accepted at Benares, proceed to discuss the law, as they say, “independently of those decisions” and arrive at the conclusion that such a distinction was not tenable, and that the widow's [708] “power of disposition over both moveable and immoveable property is limited to certain purposes, and on her death both pass to the next heirs of her husband.”

More recently in *Muttu Vaduganadha Tevar v. Dorasinga Tevar*, 8 I. A., 99, where the question was as to the estate of a daughter, the Privy Council after referring to *Bhugwandeem Doobey v. Myna Bae*, 11 M. I. A., at p. 507, broadly lay it down as settled that “as regards both moveable and immoveable property, a woman, taking by inheritance from a male, takes only a restricted interest which, on her death, devolves on the heir of the last male owner.” It is plain, however, as shown by their Lordships' remarks in the second paragraph of their judgment at page 109, that this decision was based on the Mitakshara as applicable to Benares, and that they did not intend to shut out the possible contention that such a construction of the Mitakshara was not applicable to other parts of India, and they proceed to remark that, as regards the Carnatic, where the case before them arose, the other authorities in the Carnatic besides the Mitakshara, viz., the Smriti Chandrika and Daya Vibhaga, afford no reason for holding that “the root of the title was to be found in the woman and not in her father.” This examination of the above important judgment of the Privy Council shows clearly, we think, that their Lordships considered that the law as to the nature of the widow's estate in the property inherited from her husband might not only be different in the Benares and other Western Schools from what it is in Bengal, but that the law might also differ in the Benares and Western Schools according as the Mitakshara, which was, for the most part, the principal authority in those schools, might receive different constructions by being read by the light of the other authorities in those schools in conjunction with local usage and custom. This conclusion from the Privy Council authorities is developed more at length in the judgment in *Bhagirathibai v. Kanhujirao*, I. L. R., 11 Bom., at p. 292.

Passing, then, to the consideration of the Bombay authorities on the subject, we find it laid down as far back as 1859 by Sir MATTHEW SAUSSE in

Pranjivandas v. Devkuvarbai, 1 Bqm. H. C. Rep., 130, that "according to the spirit and practice of Hindu law, as recognised [709] in Western India, the widow has an uncontrolled power over the moveable estate, but has nothing more than a life estate in the immoveable estate." In 1863, FORBES, ERSKINE and WESTROPP, J.J., in *Bechar v. Bai Lakshmi*, 1 Bom. H. C. Rep., 56, also held that "the Hindu law on this side of India gives a widow absolute power over the moveable property of her deceased husband which has been inherited by her, but no power to alienate immoveable property, except under certain circumstances."

Since these decisions, the question as to the estate of the widow in moveable property inherited from her husband would not appear to have called for judicial decision in this Presidency. However, in the judgments delivered in *Lakshmi Bai v. Ganpat Moroba*, 4 Bom. H. C. Rep., at p. 163, *Lalchand Ramdayal v. Guntibai* and *Ghela Pema v. Guntibai*, 8 *Ibid*, at p. 156, and *Tuljaram Morarji v. Mathuradas and others*, 1 L. R., 5 Bom., at p. 670, we find Sir M. WESTROPP stating the law to be well settled that the widow inherits "an absolute interest" in the moveables. It is difficult to read this statement of the law otherwise than as meaning that the widow took the moveables as her own property in the largest sense of that expression, and indeed in *Morarji Gokuldas v. Parvatibai*, 1 L. R., 1 Bom., 177, it was assumed that the widow could make a valid will of the moveable property of her husband, the only disputed questions in that case being whether she could inherit owing to her blindness and whether her will was established. However, in *Mussumat Thakoor Deyhee v. Rai Baluk Ram*, 11 M. I. A., at p. 175, the Privy Council had already expressed the opinion that the result of the authorities seemed to be that although, according to the law of the *Western Schools*, the widow might have a power of disposing of moveable property inherited from her husband which she has not under the Bengal law, she is by the one law, as by the other, restricted from alienating any immoveable property, and that on her death the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband. And again in *Bhuqwandeen Doobey v. Myra Bae*, 11 M. I. A., at p. 511, 12, after referring to the Bombay [710] cases in 1 Bom. H. C. Rep., their Lordships say: "The preponderance of authority is certainly in favour of the proposition that, whether the widow has or has not the power to dispose of inherited moveables, they, as well as the immoveable property, if not disposed of, pass on her death to the next heirs of her husband." In *Jarkisondas Gopaldas v. Harkisondas Hullchand and another*, 1 L. R., 2 Bom., at p. 12, Mr. Justice GREEN states this to be settled law on the authority of the above statements in 11 M. I. A., at pp. 139 and 487, and of those also in *Vijarangam v. Lakshman*, 8 B. H. R., 244: and the above view of the law as regards the devolution of the moveable property of the widow's death was also followed by SARGENT, C.J. and NANABHAI, J., in *Harilal Harjivandas v. Prannalavdas Parbhudas*, 1 L. R., 16 Bom., at p. 232, in a case from Ahmedabad, and again by BIRDWOOD and PARSONS, J.J., in *Bai Jamna v. Bhaishankar*, *Ibid*, at p. 237.

There is, doubtless, great difficulty in reconciling the views which, the above authorities show, have prevailed in this Court as to the absolute estate of the widow in the moveable property and the devolution of that estate on the death of the widow—a difficulty which cannot be got over by drawing a distinction between the Mitakshara when construed by itself and the same authority when construed by the light of the Mayukha, as both of these authorities treat woman's property as including other property than her technical *stridhan*, and both leave the question—whether that "other property" includes property inherited by a widow from her husband—in precisely the same state for

decision as may be seen by comparing Ch. IV, sec. 8, paras. 1 and 2, of the Mayukha, with Ch. II, sec. 1, para. 39, of the Mitakshara. The Mayukha cannot, therefore, be said to afford any assistance in construing the Mitakshara in a different sense from what has been given to it by the Privy Council, and, indeed, the judgment of WEST, J., in *Vijarangam v. Lakshuman*, 8 Bom. H. C. Rep., at p. 257, where that learned Judge is disputing the correctness of the Privy Council's construction of the Mitakshara, shows that no fresh argument was to be derived from the Mayukha in aid of the view he was contending for, viz., that property inherited by [711] a widow from her husband was woman's property based on Mitakshara, Ch. XI, sec. 11, paras. 3 and 4. As to the conclusion arrived at by Sir MATTHEW SAUSSE that the widow has the power of alienation over the moveables, the judgment shows that it was the result of the statement in Steele's Law and Customs of Hindu Castes.

In this state of the authorities, we think that the ruling of the Privy Council, that the property inherited by a widow from her husband devolves on his heirs at her death, must have effect given to it throughout the Presidency with regard to the devolution of the moveables so inherited, and to that extent, if the decision in *Damodar v. Purmanandas*, I. L. R., 7 Bom., 155, is to be regarded as necessarily giving the moveables that remain to the widow's heirs, it must be treated as of no authority. Assuming then, as we think we must, that the moveables existing at the time of the widow's death devolve, by inheritance, on her husband's heirs, we think the widow's power of alienation over the moveables cannot be regarded as including the power of willing them away at her death so as to displace the right of inheritance by her husband's heirs. We must, therefore, answer the question referred to us in the negative.

The reference being answered in the negative, the Division Bench reversed the decree.

NOTES.

[Even where a Hindu widow (or a woman who is a *gotraja-sapinda* by marriage) has absolute powers of disposal over inherited moveables, the undisposed of residue is taken by the heirs of the original propositus and she has no power to will them away ;—(1900) 2 Bom. L.R. 888 ; (1899) 24 Bom., 192 ; (1904) 28 Bom., 453 ; (1907) 32 Bom., 59 ; (1908) 10 Bom. L. R., 210 ; see also (1895) 21 Bom., 170.]

[17 Bom. 711] ORIGINAL CIVIL

The 12th June, 1893.

PRESENT :

MR. JUSTICE STARLING.

Muncherji Furdoonji Mehta and Perozbai.....Plaintiffs

• versus

Noor Mahomedbhoy Jairajbhoy Pirbhoy and others.....Defendants.*

Mortgage—*Sale by mortgagee*—*Notice of sale*—*Subsequent mortgage of same property*—*Notice of sale to mortgagors*—*Notice of sale to subsequent mortgagees*—*Delay in selling*—*Rescission of notice of sale*—*Suit by second mortgagee to prevent sale*—*Offer to redeem joint mortgage*—*Right of mortgagee to sell mortgaged property.*

Certain property was mortgaged to the defendants in 1885 for Rs. 60,000, and the mortgage-deed contained the usual power of sale on notice to the mortgagors or their [712] assigns. The debt was not paid, and the defendants on the 31st August 1891, gave

* Suit, No. 236 of 1893.

notice of sale to the mortgagors, but did not then proceed further in the matter. Three days after this notice, viz., on the 3rd September 1891, the mortgagors mortgaged the property to the plaintiffs for Rs. 10,000. On the 18th November 1892, the plaintiffs by letter offered to transfer their mortgage to the defendants or to join with them in selling the property. In the event of their being unwilling to accept either of these proposals the plaintiffs requested the defendants to render an account of the sum due to them in order that they (the plaintiffs) might, if so advised, redeem the defendants' mortgage. On the 3rd December 1892, the plaintiffs by letter enquired whether the defendants were willing to reconvey the mortgaged property on payment of a certain sum, which was less than the amount the defendants claimed, but they did not positively offer to pay the defendants either that amount or the amount which might be found to be due. In April 1893, the defendants advertised the property for sale on the 27th of that month without giving notice of sale to the plaintiffs, and on that day the plaintiffs filed a suit and obtained a rule, restraining the defendants from proceeding with the sale. In the argument of the rule it was contended for the plaintiffs, first, that the defendants had no power to sell, because their mortgage-deed required previous notice of sale to be given to the mortgagors or their assigns, and no such notice had been given to the plaintiffs, who, as subsequent mortgagees, were assigns of the equity of redemption; secondly, that the notice of sale given to the mortgagors on the 31st August 1891, had been rescinded and a fresh notice was, therefore, required; and, thirdly, that inasmuch as the plaintiffs were willing to redeem the defendants' mortgage the sale should be restrained.

Held—(1) that notice to the plaintiffs was not necessary. Proper notice had been given to the mortgagors on the 31st August 1891, three days before the plaintiffs had acquired any interest in the equity of redemption. No further notice was required to be given to any person who at that time was not an assign, in order to enable the defendants to sell under that notice. An assign must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he has any authority to interfere;

(2) that the notice of sale of the 31st August 1891, had not been rescinded by the defendants, who were not bound to give a fresh notice before the sale advertised to be held on the 27th April 1893. The mere fact of a long delay taking place between the maturing of the notice of sale and the actual sale does not make a fresh notice necessary;

(3) that on the evidence it did not appear that the plaintiffs were able and willing to redeem the defendants' mortgage. The plaintiffs admittedly had not the money in hand, and the Court would not interfere with a mortgagee's right to sell on the mere chance of the plaintiffs being able to make arrangements to pay the amount due at some uncertain time.

Where a mortgage-deed which gave the mortgagee a power of sale contained also a proviso that the remedies of the mortgagors, their heirs, administrators, and assigns in respect of any breach of the clauses or provisions (relating to such sale) or of any impropriety or irregularity whatever in any such sale should be in damages,

[713] *Held*, on the authority of *Prichard v. Wilson*, 10 Jur. (N. S.), 330, that the Court would not grant an injunction to restrain the mortgagee from selling the mortgaged property.

RULE for an injunction restraining a sale by mortgagees of mortgaged property.

The plaintiffs were second mortgagees of the property in question. The first three defendants were prior mortgagees. The remaining defendants (Nos. 4 to 8) were the owners and mortgagors.

The plaint stated that the first three defendants were the mortgagees of the property in question under a mortgage dated 7th September 1885, for Rs. 60,000. They also held a deed of further charge on the said property dated 12th October 1889, for Rs. 9,000.

The said property was mortgaged to the plaintiffs on the 3rd September 1891, for a sum of Rs. 10,000. At the date of suit the amount due to the plaintiffs upon their mortgage was Rs. 11,900. There was also a large sum due to the first three defendants in respect of their prior mortgage of the 7th September 1885, and the deed of further charge.

The plaintiffs alleged in the plaint that the first three defendants were desirous to obtain the property for themselves, and in collusion with the mortgagors were endeavouring to depreciate its value and were thereby lessening the security of the plaintiffs. They stated that the first three defendants had in the previous year advertised the property for sale on four different occasions, and then, without any reason, postponed the sale, thereby disappointing intending purchasers.

They further stated that on the 18th November 1892, they had by letter offered to transfer their mortgage to the first three defendants, or to join with them in selling the property. In the event of the defendants being unwilling to accept either of these proposals, the plaintiffs requested the first three defendants to render an account of the sum due to them, in order that their mortgage might be redeemed. The said defendants, however, had not complied with any of these proposals.

The plaintiffs further alleged that the first three defendants, ostensibly in exercise of their power of sale under their mortgage [714] of 7th September 1885, and in collusion with the mortgagors, for the purpose of defrauding the plaintiffs, had again recently advertised the property for sale on Thursday the 27th April 1893. The plaintiffs received no notice of the intended sale.

The plaintiffs alleged that the time of year chosen by the said first three defendants was exceedingly unfavourable for the sale of the property, and that the notice of sale was far too short and was otherwise wholly insufficient, and that, if the sale were allowed to take place on the 27th April, the property would certainly be sold far below its value and at a price wholly inadequate to pay off the mortgages, and that they would thereby suffer a heavy loss.

The plaint prayed for redemption, for accounts, and for a sale if necessary, &c.

The plaint was presented on the 27th April, and on the same day a rule nisi was obtained by the plaintiffs calling on the first three defendants to show cause why they should not be restrained from selling the said property. An interim injunction against the intended sale was granted at the same time.

The rule now came on for argument.

Macpherson, for the first three Defendants, showed cause. He cited *Kerr on Injunctions* (3rd Ed.), pp. 524, 525; *Hill v. Kirkwood*, 28 W. R., 358; *Hickson v. Darlow*, 23 Ch. D., 690; *Prichard v. Wilson*, 10 Jur. (N. S.), 330.

Inverarity, for Plaintiffs, in support of the rule. He cited *Naran Purshotam v. Dolatram Virchand*, I. L. R., 6 Bom., 539, at p. 540; *Mohan Manor v. Toqu Uka*, I. L. R., 10 Bom., 224; *Rhodes v. Buckland*, 16 Beav., 212; *Hoole v. Smith*, 17 Ch. D., 434; *Coote on Mortgage*, p. 274; *Tommey v. White*, L. R., 3 H. L., 49.

Starling, J. :—The plaintiffs in this suit are mortgagees of a property in Bombay, known as the Imambara, and their mortgage, which was made on the 3rd September 1891, is subject to certain mortgages in favour of the first three defendants. The property had been advertised for sale by these defendants several times before the plaintiffs took any step in the matter. At [715] the end of 1892 certain correspondence took place between the solicitors of the plaintiffs and the defendants, which seems to have come to an end in December of that year. In April 1893, the defendants advertised the mortgaged properties for sale on the 27th idem, and on that day the plaintiffs filed a suit and obtained a rule nisi with an interim injunction restraining the defendants from proceeding with the sale, and the question I have to determine is whether that rule and injunction should be discharged or not.

Mr. Inverarity, for the plaintiffs argued that the defendants at the present time had no power to sell at all, because, the mortgage deed providing that notice should be given to the mortgagors or their assigns, they had not given notice to the plaintiffs, who as subsequent mortgagees were assigns of the equity of redemption, citing on that point *Hoole v. Smith*, 17 Ch. D., 434, in which Fry, J., held that in such a case it was impossible to hold that it was sufficient to go on serving the mortgagor after he had assigned his equity of redemption. It appears, however, that the defendants gave a notice of sale to the mortgagors on the 31st August 1891, i. e., three days before the plaintiffs had any interest in the equity of redemption; and as that appears to me to be a proper notice, I do not think that any further notice would be required to be given to any person who at that time was not an assign, in order to enable the defendants to sell under that notice; because I am of opinion that an assign must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he has any authority to interfere.

It has been, however, argued for the plaintiffs that the notice of the 31st August 1891, has been rescinded, and consequently a fresh notice was required. In support of that the case of *Tommey v. White*, L. R., 3 H. L., 49, was cited. In that case, a debtor had assigned his house and business for the payment of his debts, the debtor being left in possession, and a power given to the trustee to sell the property on giving notice to the debtor. The trustee gave a proper notice, which was subsequently withdrawn by the consent of the creditors and the trustee, and the Court held that under such circumstances the trustee could not subsequently sell without giving a fresh notice. The mere fact of a long delay having taken place between the maturing of the notice for sale and the actual sale, does not make a fresh notice necessary—see *Metters v. Brown*, 33 L. J. (Ch.), 97 where the delay was nearly four years; consequently to make *Tommey v. White*, L. R., 3 H. L., 49, applicable, it must, in my opinion, be shown that there was an actual withdrawal of the notice of the 31st August 1891, but I can find no evidence of this having been done. All that the defendants did was at the request of the mortgagors and in consideration of their promising to do certain acts to postpone the sale in some instances, and in one instance, to stop a particular sale. I can find no case which lays down the principle that postponing or even stopping a sale effects a withdrawal of the notice under which the sale is about to take place; and I should be surprised if such a case were to be cited, seeing that mortgagees ordinarily are given full power to buy in, or rescind, or vary, any contract for sale and to resell, without being responsible for any loss occasioned thereby; and if the mortgagee can stop a sale by buying in or by rescinding a contract, I fail to see why he should not be authorized to stop one by giving notice to the auctioneer not to proceed with it. Consequently, I am of opinion that the defendants did not rescind their notice of sale, and were not bound to give a fresh notice before the sale intended to have been held on the 27th April last, at which time a notice to the mortgagors and the plaintiffs, or at any rate to the plaintiffs, would have been necessary if a fresh notice had to be given.

It was then argued on the authority of *Rhodes v. Buckland*, 16 Beav., 212, that as the plaintiffs are willing to redeem, and the defendants had refused to accept their offer and threatened to sell, the Court would restrain the sale. Now I am not at all sure that the plaintiffs were willing (which must also include able) to redeem. It was admitted by Mr. Inverarity in the course of his argument that the plaintiffs had not the money in hand, and would have to make arrangements in order to obtain it, and I should be very sorry

to interfere with a mortgagee's right to sell on the mere chance of the plaintiffs being able to make arrangements to pay the amount due at some uncertain time. In *Rhodes v. Buck*, [717] *land*, 16 Beav., 212, the plaintiff gave notice (notice of intended payment being necessary) that at a particular time she would be ready to pay the amount which might be due; but what the plaintiffs here did on the 18th November 1892, (and that only in the alternative) was to ask for accounts to enable them, "if so advised, to redeem," which is a very different thing; and on the 3rd December 1892, the plaintiffs only inquired whether the defendants were willing to reconvey the mortgaged property on the payment of a certain sum named therein, which is less than the amount claimed by the defendants, and do not positively offer to pay the defendants either that amount or the amount which might appear to be due. In my opinion, however, the plaintiffs were never willing and ready to redeem, but, fearing that they would not realize the full amount due on their mortgage, they wanted to induce the defendants to pay them off and take an assignment of their security. This appears to be the main object of the letter of the 18th November 1892. There is, however, another objection to this rule being made absolute. The mortgage-deed provides that "the remedies of the mortgagors, their heirs, administrators, and assigns in respect of any breach of the clauses or provisions lastly hereinbefore contained (i. e., with regard to notices and sales) or of any impropriety and irregularity whatever in any such sale shall be in damages," and the case of *Prichard v. Wilson*, 10 Jur. (N. S.), 330, lays down the rule that in such a case a Court of Equity will not grant an injunction to stop a sale.

The result is that the rule and the *interim* injunction of 27th April last ought to be discharged, but as the defendants are willing to accept an offer now made by the plaintiffs to pay them Rs. 1,20,000 within a fortnight, the rule and the *interim* injunction will stand over for that time, and in the event of the said sum being paid within that time the rule will be made absolute. Plaintiffs paying their own costs, first three defendants' costs to be costs in the cause. If the said sum be not paid within the time limited, the rule will be discharged with costs.

Attorneys for the Plaintiffs :—Messrs. *Framji and Moos*.

Attorneys for the Defendants :—Messrs. *Thakurdas, Dharamsi and Cama*.

[718] ORIGINAL CIVIL.

The 29th July, 1893.

PRESENT:

MR. JUSTICE STARLING.

Cooverji Hirji.....Plaintiff

versus

Dewsey Bhoja.....Defendant

and

Nebha Dewsey and others.....Claimants.

Hindu law—Joint family—Ancestral property—Father's debt—Decree against father—Execution—Liability of family property—Purchaser—Civil Procedure Code (XIV of 1882,) Secs. 318, 332, 333

In a suit for specific performance of a certain contract for the sale of land which the defendant had failed to complete, the plaintiff obtained a decree against the defendant for the repayment of the earnest money and his costs of suit. In execution of this decree the plaintiff attached the whole of the property which the defendant had agreed to sell. A warrant for

* Suit No. 380 of 1890.

sale was duly issued, and claims were advertised for. The sons of the defendant thereupon appeared before the Commissioner and claimed to be entitled to three-fourths of the property, which they alleged was ancestral. Their claim was not investigated, but to save time it was agreed that a note should be made in the proclamation of sale, that the sons claimed to be interested in the said lands and premises on the ground that they were ancestral, and that the one-fourth share of the defendant only could be sold by the attaching creditor. Under this proclamation the right, title and interest of the defendant in the property were sold. At the sale the sons gave notice of their claim. The property was duly sold and the purchaser was put into possession, the claimants being dispossessed. The claimants then took out a summons under section 332 of the Civil Procedure Code (XIV of 1882) calling upon the purchaser to show cause why they should not be restored to possession.

Held—(1) that the judgment-debt due by the defendant was one which the plaintiff could enforce, if necessary, against ancestral property in the hands of the defendant to the extent of the whole interest therein of the defendant and his sons, as it was not an immoral or illegal debt;

(2) that, assuming that the property in question was ancestral, what the purchaser bought was the whole property and not merely the right which the defendant might have as the father of the family to a share of it on partition. The plaintiff evidently did not acknowledge any right in the claimants, but intended to sell the very largest right the defendant might have in the property, which, as the judgment-debt was one for which the family property was liable, was the whole estate of the joint family;

(3) that the purchaser, who had bought the whole of the rights of the family in the property, was entitled to the possession of what he bought, and was not required to file a suit for partition, because the shares of all the co-parceners had passed to him;

(4) assuming that the property was ancestral, the claimants were not in possession on their own account, and were, therefore, not entitled to be restored under section 332 of the Civil Procedure Code (XIV of 1882). A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family.

[719] (5) that all the sons were entitled to, was to try the fact or nature of the debt due to the plaintiff in a suit of their own. In such suit they would have to prove that the debt was not such as to justify the sale.

In chambers. On the 2nd April 1892, the plaintiff Cooverji Hirji obtained a decree against the defendant for Rs. 2,905-5-9. In execution of the decree a certain oart situate at Matunga, in Bombay, was attached. The claimants, who were the sons of the defendant, thereupon lodged a claim to the oart. They alleged that it had formerly been a part of the family property belonging to themselves and their father, but that a partition had been effected, and that the oart in question had been allotted to them.

On the 5th October 1892, the Sheriff of Bombay sold by auction, in execution of the said decree, the right, title and interest of the first defendant in the said oart to one Damji Jaitha for Rs. 2,601. At the sale, the claimants (the sons) gave notice to the bidders of their claim.

On the 6th February 1893, the sons were dispossessed by the Sheriff in execution of the decree, and possession was given to the purchaser Damji Jaitha.

The claimants (the sons) then took out a summons under section 332 of the Civil Procedure Code (XIV of 1882), calling upon the purchaser to show cause why the property in dispute should not be redelivered to them.

Inverarity, for the Claimants, in support of the summons.

Macpherson, for the Plaintiff and the Purchaser, showed cause.

Reference was made to *Rai Babu Mahabir Pershad v. Rai Markund Nath*, L. R. 17 Ind. Ap., 11.

Starling, J.:—In this case the defendant, a Hindu, having a family of sons, entered into a contract with the plaintiff and another, the rights under which eventually became vested in the plaintiff, to sell a certain piece of land at Matunga, and received the sum of Rs. 1,000 as earnest-money. That contract was not carried out by the defendant, and the plaintiff filed a suit against the defendant for specific performance of the contract, or else for return of the earnest-money with interest.

[720] When the case came on for hearing, FARRAN, J., refused to grant specific performance, but passed a decree in favour of the plaintiff for the amount of earnest-money and interest, and the costs of the suit. The result was that the defendant became indebted to the plaintiff in the sum of Rs. 2,905-5-5; and this was a debt which, in my opinion, the plaintiff could enforce, if necessary, against ancestral property in the hands of the defendant, to the extent of the whole of the interest therein of the defendant and his sons, as it was not an immoral or illegal debt.

Subsequently to the passing of this decree, the plaintiff caused the whole of the property which the defendant had agreed to sell, to be attached in execution of the decree. On that attachment being placed on the property, the present claimants did not appear and apply to have the attachment in any way restricted in its operation, as they might have done. In due course a warrant for sale was issued, and on the usual advertisement being issued for claims on the property, the claimants, who are the sons of the defendant, appeared before the Commissioner and claimed that the defendant was only entitled to one-fourth of the property, and that they were as his sons, the property being ancestral, entitled to three-fourths thereof. Whether the property is ancestral or not, is open to doubt. The defendant, in his written statement, says it is his self-acquired property, and the claimants now assert it to be ancestral, but I do not find any proof, in their affidavits, of their assertion. I, however, proceed on the assumption that it is ancestral. The claim of the claimants was not investigated and allowed by the Commissioner, but, to save time, it was agreed that a note should be made in the proclamation of sale that they "claim to be interested in the said lands and premises, on the ground that they are ancestral, and that the one-fourth share of the defendant only can be sold by the attaching creditor." Under this proclamation, the property was sold to one Damji Jaitha.

The sale was not made subject to the claim of the claimants, and it is evident that the plaintiff did not acknowledge any right in the claimants, but intended to sell the very largest right the defendant might have in the property, assuming him to be the [721] father of a joint Hindu family in possession of ancestral property, which, as this debt was one for which the family property was liable, was the whole estate of the joint family. Consequently, I hold that what Damji Jaitha bought was the whole property, and not merely the right which the defendant might have, as the father of the family to a share of it on partition.

Subsequently the purchaser was put in possession of the property by the Sheriff, and in carrying this out the claimants were dispossessed, and now claim under section 332 of the Civil Procedure Code (XIV of 1882) to be restored to possession.

Now it seems to me that the auction-purchaser, who has bought the whole of the rights of the family in the property, is *prima facie* entitled to possession of what he bought. Mr. Inverarity referred me to section 329 of Mayne's Hindu Law, as showing that the purchaser in this case ought to have filed a suit for partition, but that section only deals with cases in which the share only of the

father has been sold, and not to cases; like the present, where the rights of the whole family have been sold. In the former class of cases a suit for partition is the only available remedy, as the share of the father must first be ascertained before it can be awarded to the purchaser, but in this case there is no necessity to ascertain the shares of the co-parceners, because the right of all of them has passed to the purchaser.

It was further argued that the claimants were in possession on their own account, and must, therefore, be restored to possession. I do not think they were. A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family, unless there is evidence to show that he had set up a right to a particular piece of land adversely to the family, which it has always been held must be very strictly proved. Consequently I hold that the claimants were not in possession of the land, of which they were disposed, on their own account within the meaning of section 332 of the Civil Procedure Code.

The result is (in the words of the Privy Council in *Deendyal's* case, L. R., 13 Ind. Ap., p. 18) that all the sons can claim is that they ought not to be [722] debarred from trying the fact or nature of the debt in a suit of their own; and assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale.

Hitherto I have discussed this case as if the defendant and his sons were members of a joint and undivided Hindu family, and this was the footing on which it was argued by Mr. Inverarity; but this was not the case made by the claimants when they obtained their summons. Then they claimed possession on the ground that there had been a partition between them and their father, and that they were in possession of a divided share of the ancestral property. They do not, however, allege that there were any conveyances or releases evidencing the partition, and it appears that the partition, if there ever was one, which I very much doubt, took place after the property was attached, in fact after the proclamation of sale was issued (see their letter to the Sheriff of 1st February 1893, annexed to Nebha Dewsey's affidavit of March 1893), in which case section 333 of the Civil Procedure Code prevents section 332 applying, because if there was a partition at the time alleged, the judgment-debtor must have transferred his interest, his undivided share in the property claimed, and released his claim over the undivided shares of the claimants in such property after the institution of the suit in which the decree was made. Section 318 of the Civil Procedure Code relied on by Mr. Macpherson, for the purchaser, also provides that a purchaser shall be entitled to be put in possession of the property bought by him, if it is in the possession of a person claiming under a title created by the judgment-debtor subsequent to the attachment of the property.

Under these circumstances the summons must be dismissed, unless the claimants file a suit within one month.

Attorneys for Claimants — Messrs. *Daphtary and Ferreira*.

Attorneys for Purchaser — Messrs. *Wadia and Ghandy*.

NOTES.

[These decisions are similar. — (1900) 3 Bom. L.R., 322; (1901) 25 Bom., 478, (1909) 11 C. L. J., 61; 14 C. W. N., 298.]

[723] ORIGINAL CIVIL.

The 25th, 27th and 29th July, 1893.

PRESENT:

MR. JUSTICE STARLING.

Raisett Chandmull Hamirmull and another.....Plaintiffs
versus

Great Indian Peninsula Railway Company.....Defendants.*

Railway company—Indian Railway Act (IV of 1879). Sec. 11—Loss of goods—Liability of company—Carrier—Bailment—Declaration of nature and value of goods and payment of increased charge, effect of—Contract Act IX of 1872, Sec. 151—Limitation Act (XV of 1877), Art. 30, Sch. II.

In respect of goods for which, under section 11 of the Indian Railway Act IV of 1879, a railway company is under no liability unless "an increased charge" is paid, the payment of an increased charge puts them under the same liability as they are under with respect to goods not specially provided for by that section, viz., the liability of ordinary bailees. The payment of "an increased charge" is not equivalent to insurance.

In January 1890, a box containing silver specie was delivered by the plaintiffs to the defendant company in Bombay to be carried to Saugor. At the time of such delivery the contents of the box were declared, and an increased charge above the charge for ordinary parcels was paid. The box was lost during its transmission to Saugor, but no evidence was called by the defendants to show what was done with the box between Itarsi and Saugor. In 1893 the plaintiffs sued the defendants to recover its value.

Held that the defendants had not discharged the onus which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in section 151 of the Contract Act (IX of 1872), and that they were liable for the amount claimed.

Held, also, that the suit was not barred by limitation, and that article 30† of Schedule II of the Limitation Act (XV of 1877) did not, as was contended, apply to the case.

THE plaintiffs sued to recover from the defendants Rs. 6,000, the value of a box delivered to the defendant company at Bombay to be carried by them to Saugor, but which had been lost.

The plaintiffs alleged that the box in question contained Rs. 6,000, and that on the 3rd January 1890, they delivered it to the defendants, consigned to Raghunathdas Amermull at Saugor. The box weighed over two maunds, and was duly sealed and addressed both in English and Marathi.

Saugor is a station on the Indian Midland Railway, about 654 miles from Bombay, and is the terminus of a branch line running from Bina junction on the main line of the said railway, midway between Bhopal and Jhansi.

[724] On delivering the box to the defendants, its contents were declared and an increased charge above the charge for ordinary parcels was paid for the carriage, and a railway receipt was duly handed to the plaintiffs. In the plaint

* Suit No. 636 of 1892.

† [Art. 30:—

Description of suit.	Period of limitation.	Time from which period begins to run.
Against a carrier for compensation for loss or injuring goods.	Two years ..	When the loss or injury occurs.]

the plaintiffs stated that no intimation was given to them that the increased charge was not for the insurance of the box and its contents; and that they would have paid any further sum required by the company if they had been informed that any further payment was necessary.

The defendants (*inter alia*) pleaded that under the provisions of section 11* of Act IV of 1879 they were not liable for the loss of the box in question; that if the box, when delivered, contained specie as alleged by the plaintiffs, the specie was lost either while in transit or at Saugor Station. Diligent search had been made for the specie, but none had been found. They also pleaded limitation.

Inverarity and Russell for Plaintiffs:—They cited *The Indian Railway Act IV of 1879*, section 11; *Secretary of State for India v. Budhu Nath Poddar*, I. L. R., 19 Cal., 539; *Irrawady Flotilla Company, Limited v. Bhugwandas*, L. R., 18 Ind. Ap., 121, s. c., I. L. R., 18 Cal., 621; *Bradbury v. Sutton*, 19 W. R., 800, s. c., 21 W. R., 12; *Gill v. The Manchester, Sheffield, &c., Railway Company*, L. R., 8 Q. B., 186; *Starling on Limitation* (2nd Ed.), p. 152.

Lang (Acting Advocate General) and *Macpherson for Defendants*:—They cited *Venkatachala v. South Indian Railway Company*, I. L. R., 5 Mad., 208; *Robinson v. The South-Western Railway Company*, 34 L. J. (C. P.), 234; [725] *Laljiabhai v. The Great Indian Peninsula Railway Company*, I. L. R., 15 Bom., 537; Statute 12 and 13 Vict., c. 83.

Starling, J.:—In this case the plaintiffs sue the defendants to recover from them the sum of Rs. 6,000, being the value of a box of silver specie alleged to have been delivered at the Byculla Station for carriage to Saugor on the 3rd January 1890, but which never reached its destination. The first point to be determined is whether such a box was delivered to the defendants to be carried to Saugor. (His Lordship referred to the evidence and continued):—I must come to the conclusion that the box for which exhibit B is the receipt, was delivered to the defendants and did contain Rs. 6,000 in silver coin. That box did not arrive at Saugor, but when the agent of the addressee went to the Saugor Station on the morning of the 6th January with exhibit B, he was tendered a box packed in gunny, with no seals on it, weighing only 36 seers, and which was afterwards discovered to contain nothing but a quantity of black cotton soil and two large iron hammer heads. The box despatched not having been delivered at its destination, the question arises whether the defendants are liable for its non-delivery.

The first defence relied upon by the defendants is that of limitation, they alleging that article 30 of Schedule II of the Limitation Act (XV of 1877) applies, and that, as this suit is not brought within two years from the date of loss, it is barred; but there are a number of cases, all of which are cited at page 132 of *Starling's Limitation Act*, which show that that article does not apply to a case like the present, and that this suit, having been brought within three years, is in time.

* Section 11 of Act IV of 1879:—

When any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction or deterioration of, or damage to, such property, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf.

When any property of which the value and nature have been declared under this section has been lost, destroyed or damaged, or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared.

The defendants then say that as the contents of the box were silver coin, and it was sent uninsured, they are not liable for its loss under any circumstances. The determination of this point requires the discussion of the liability of railway companies under Act IV of 1879 in respect of goods delivered to them for carriage.

For the purposes of this judgment I assume that the decision in *Kuverji Tulsidas v. G. I. P. Railway Co.*, I. L. R., 3 Bom., 109, is unaffected by the judgment of the Privy Council in *Irrawady Flotilla Co. v. Bhugwandas*, 18 Ind. Ap., 121, S.C., I. L. R., 18 Cal., 621, so far as railways in India are concerned, and that the [726] ordinary liability of such companies was in January 1890, only that of bailees, and that they were bound to take as much care of goods delivered to them for carriage as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value, as those delivered for carriage, and no more. That section 11 provides that, with respect to certain classes of goods, among which are silver or silver coin, no liability whatever shall attach to them in respect of the loss, &c., of such goods, unless at the time of delivery for despatch, the value and nature of the goods shall have been declared, and an increased charge for the safe conveyance of the same, or an agreement to pay the same, have been accepted by the railway company. The ordinary state of the company with regard to such goods being, therefore, entire freedom from liability, what liability attaches to them if the requisite declaration is made, and the extra charge paid? In England the point is easier to decide, because carriers are insurers and are absolutely liable for the safety of goods in general entrusted to them for carriage, unless exempted from such liability by law, which is the case in respect of certain special goods unless certain conditions are fulfilled but if those conditions are fulfilled then their ordinary liability attaches, which is that of insurers. In this Presidency, railway companies were in 1890 under the ruling of this Court (*Kuverji Tulsidas v. G. I. P. Railway Company*, I. L. R., 3 Bom., 109), entirely exempted from the liability of insurers, and were only subject to the ordinary liabilities of bailees. But if, in England, the fulfilment of certain conditions in respect of certain goods relegates carriers to their ordinary liability as insurers, I do not see why in this country the fulfilment of similar conditions should not relegate railway companies back to their ordinary liability as bailees, because the section does not provide that, if the prescribed conditions be fulfilled, the railway company shall become an insurer, but only that the ordinary liability shall not attach unless those conditions are fulfilled. I am of opinion, therefore, that if the conditions prescribed by section 11 be fulfilled by the consignor of goods referred to in that section, the railway company will then become liable for such goods in the same way as for those classes of goods which are not specially [727] provided for by that section, viz., as bailees. Then, what is meant by "an increased charge"? I do not think that a charge for insurance is "an increased charge" within the meaning of this section. A contract of insurance, unless it is otherwise provided for therein, implies an absolute guarantee for the safe arrival of the goods insured at the place of their destination; but, if I am right in holding that the fulfilment of the conditions specified in section 11 relegates the company to its ordinary position as bailees, their liability is certainly not that of insurers: consequently "an increased charge" cannot be a payment which imposes upon them liabilities larger than those of ordinary bailees.

Let us now look at what happens when a parcel is taken to one railway station for conveyance to another. In ordinary cases, the booking clerk asks no questions, and the consignor gives no information as to the contents of the parcel, but the ordinary charge for a parcel is made (which in the present case would

have been Rs. 9) and a receipt is given for the parcel, in respect of which the railway company is bound to exercise the care which an ordinary bailee should exercise, and is not liable at all in respect of any articles referred to in section 11 which may be in it. If the booking clerk, however, is informed that the parcel contains certain specific articles, he would at once look up the rates in the coaching tariff book, and would charge the proper rate for those articles, it might be less or more than the ordinary parcel rate. If the rate was more than the ordinary rate, and the contents of the parcel such as fell under the exceptions in section 11, I think that rate would be "an increased charge" within the meaning of section 11. The actual cost to the railway company of receiving, carrying and delivering a maund of silver is no greater than that of a maund of iron. Why, then, should a larger sum be charged, unless it is to compensate the company for the increased risk they run in consequence of the greater value of the same weight and bulk or, in respect of other articles, of their greater liability to damage? To hold otherwise would be to hold that for a parcel in respect of which the company ran no liability whatever, and for the carriage of which they were put to no extra expense, they might charge a larger sum than for one in respect of which they were subject to liability, [728] and that before they incurred any liability at all in respect of the former, they were entitled to make two increased charges, *viz.*, the higher rate for carriage and insurance, and not merely "an increased charge." That the acceptance of a higher rate for excepted articles might possibly subject the company to their ordinary liability was present to the minds of the framers of the rates in the present case, is evident from the fact that on page 67 of the book of rates put in evidence, it is expressly stated that uninsured treasure is carried at owner's risk. That declaration would have been unnecessary if "increased charge" was equivalent to insurance. A similar remark is made with regard to opium, though not in such explicit terms, and a reference is also made to the page where the charges for insurance may be found. So, too, in rule 41 at page 70 where mention is made generally of the articles excepted by section 11, although the company do not categorically state that all such articles are at owner's risk unless insured, they seem to infer it, as they there refer to the place where the insurance rates are to be found. Such specific limitations of liability, however, if beyond what the law actually gives, and if reducing the liability of the company below that of bailees, are of no avail unless there is an agreement to that effect which must (*inter alia*) be in writing signed by or on behalf of the consignor (section 10). This attempted limitation, by the defendants, of their liability cannot shield them in this case, as there is admittedly no agreement for limitation of the company's liability signed by or on behalf of the consignor. The defendants must, therefore, stand or fall on the decision of the question whether "an increased charge" is equivalent to insurance. I have shown that, in my opinion, it is not. Consequently as, according to the evidence of the booking clerk Fonseca, those who brought the parcel told him that it contained *chandi rokra*, or silver coin, and paid an increased charge for it, *viz.*, Rs. 18-1-0 instead of Rs. 9, I am of opinion that the defendants are liable for the non-delivery of the parcel, unless they can show that they have taken that care of it required by section 151 of the Contract Act (IX of 1872). I may add that I have come to the opinion that those who handed the parcel to Fonseca also told him that it contained Rs. 6,000. Motilal and Buria say they did this, and [729] Fonseca admits he heard them talking about the box containing Rs. 6,000, although he denies that they actually told him; but, unless for the purpose of informing him what the contents were, I cannot conceive why they should mention the matter. I have not gone into the question as to whether the rates charged are lawful, as FARRAN, J., did in *Laljiabhai v. G. I. P. R. Company*,

I. L. R., 15 Bom., 537, because the legality of the amount is not in dispute here. The only question is what liability the defendants are under when they accept certain rates. The Exhibits Nos. 4 to 9 only settle the amount chargeable for the carriage of certain classes of goods, and do not determine what the liability of the defendants is in respect of those goods; that had already been provided for by the Act of the Legislative Council, and no resolution of Government could alter or modify the liability so provided, as the Act does not permit such an alteration.

Now, what is the evidence as to the care taken of the parcel by the defendants? The proper place for a parcel of coin such as this to be carried in, as appears from the book of rates put in evidence, was the brake-van in charge of the guard, where he would be able to keep an eye on it, and thus see that it was not meddled with; but at Byculla it was put into a road van, which was not locked, and was away from the constant direct superintendence of the guard. Fortunately, however, the parcel arrived safely at Itarsi and was there transferred to the Midland train. Then comes an entire blank; no evidence whatever is given as to what was done with the parcel, or what care was taken of it between Itarsi and Saugor, although in the ordinary course of business it would have to be taken out of one van at Bina and put into another for Saugor, which is on a branch line, and it appears from Exhibit Y that at Bina there was a period of some hours during which the parcel would be lying at the station, or in the van, possibly at some distance from the platform, waiting for the train to start for Saugor, and, if the evidence of the parcel clerk and station master at Saugor is to be believed, the parcel had already been tampered with when it arrived there. In the absence of any evidence as to how the parcel was treated between Itarsi and Saugor, it is impossible to [730] hold that the defendants have discharged the *onus*, which lay upon them, of showing that they had in respect thereof fulfilled the duties of a bailee as laid down in section 151 of the Contract Act.

It will be seen that I have not discussed the effect of the case of *The Secretary of State v. Budhu Nath*, I. L. R., 19 Cal., 538. I have not done so, because it seemed to me that I could dispose of the case in favour of the plaintiff on the assumption that the case of *Kuverji Tulsidas v. The G. I. P. Railway Company*, I. L. R., 3 Bom., 109, was good law, and as the view of the law contained therein has been adopted by the Legislature in the Railway Act of 1890, I thought a decision on those lines would be useful at the present time. If, however, it be held that the case of *The Secretary of State v. Budhu Nath*, I. L. R., 19 Cal., 538, has overruled that of *Kuverji Tulsidas v. The G. I. P. Railway Company*, I. L. R., 3 Bom., 109, then, on the payment by the consignor of the "increased charge" as before explained the railway company would have at once become insurers, and there would be no necessity to enquire what amount of care they had taken of the parcel. I must, therefore, pass a decree for the plaintiffs for Rs. 6,000, and by way of damages for the non-delivery of the parcel award them interest at 6 per cent. on such amount from the 6th January 1890, till this day. Costs and interest on judgment at 6 per cent.

Attorneys for the Plaintiffs:—Messrs. Crawford, Burder, Buckland and Bayley.

Attorneys for the Defendants:—Messrs. Little, Smith, Nicholson and Bowen.

NOTES.

[On appeal, this decision was reversed:—(1894) 19 Bom., 165.]

[731] CRIMINAL REFERENCE.

The 22nd January, 1891.

PRESENT.

MR. JUSTICE BIRDWOOD AND MR. JUSTICE PARSONS.

Municipality of Ahmedabad

versus

Jumna Punja.*

Bombay Act VI of 1873, Sec. 84—Proceedings taken under Section 84 for the recovery of municipal taxes—Such proceedings are judicial and not ministerial—Magistrate's duty under the section.

A proceeding before a Magistrate for the recovery of municipal cesses and taxes instituted under section 84 of Bombay Act VI of 1873, is a criminal prosecution, and must be conducted in the manner prescribed for summary trials under Chapter XXII of the Code of Criminal Procedure (Act X of 1882).

In such a proceeding a Magistrate is not bound to order payment of the full amount claimed by the municipality, but must satisfy himself as to the extent of the defaulter's legal liability before passing any order against him.

THIS was a reference under section 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged by the Municipality of Ahmedabad a cess rate of one rupee per annum for the removal of sullage water. He refused to pay the rate, and thereupon the Municipality prosecuted him under section 84 of Bombay Act VI of 1873.

The trying Magistrate held that the accused was liable to pay only one-half of the rate charged, and ordered him to pay that amount.

The District Magistrate thereupon made the following reference to the High Court:—

"The Honorary Magistrate has, instead of issuing the warrant applied for for the levying of arrears of taxes, taken evidence on the point whether or not the persons concerned have been rightly assessed.—that is, whether they have been placed in the proper lists or grades, and he has found that they have been assessed too highly, and he has ordered the recovery of a lesser amount.

"Looking to the meaning of section 84 of the Municipal Act, it appears to me that the Honorary Magistrate has altogether exceeded his powers. Otherwise the Honorary Magistrate becomes the appellate authority in all cases of municipal taxation, [732] and every case can be taken before him by the simple expedient of not paying the tax.

"This result is not contemplated by the Municipal Act, which provides other means for hearing appeals against municipal taxation.

"A ruling on the point is urgently and speedily required, as the action of the Honorary Magistrate has brought the collection of the tax for the removal of sullage water in Ahmedabad to a dead-lock—some 19,000 cases of refusal to pay the tax having been brought into his Court."

The reference was argued before BIRDWOOD and PARSONS, JJ.

Shantram Narayan, Government Pleader, for the Crown.

Chimanlal H. Setalvad for the Accused.

Per CURIAM.—The accused in this case was charged by the Ahmedabad Municipality a cess rate of one rupee per annum for the removal of sullage water under class F of the cess rates sanctioned by Government Resolution No. 1886 of the 1st June 1888, (see the rules of the Ahmedabad Municipality, p. 51). He refused to pay the rate for the year 1889-90, and the municipality applied to the Magistrate to recover it under section 84 of Bombay Act VI of 1873. The Magistrate found that the accused was liable under class F, sub-section 1, to only one-half of the rate charged. The District Magistrate has referred the case to the High Court, as he is of opinion that a Magistrate, dealing with an application under section 84 of the Municipal Act, has no jurisdiction to question the propriety of any claim made by the municipality, but must issue his warrant for the full amount of rate charged upon the defaulter. It is argued that, in such cases, the Magistrate acts ministerially and not judicially. We cannot accept this interpretation of the law. The Magistrate is empowered under section 84 to recover rates by a "summary proceeding" in the manner provided in the Code of Criminal Procedure (X of 1882). "This summary proceeding" must be the proceeding for which provision is made in Chapter XXII of the Code of Criminal Procedure. There is no other provision in the Code which appears to be applicable to the case. The Government Pleader contends that the proceeding referred to is that contained in section 386, which provides that, when an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of its amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned. But this view is not consistent with the ruling of this Court in *Imperatrix v. Karmashankar Bhaishankar*, Cr. Rul., 86 of 3rd December 1888, which shows that proceedings before a Magistrate under section 84 of the Municipal Act are criminal prosecutions. Such prosecutions must be conducted according to the rules applicable to summary trials. The Magistrate is bound, therefore, before sentencing a defaulter to pay a rate, to satisfy himself as to the extent of his legal liability, and did not, in the present case, act without jurisdiction by enquiring into its merits. He has, however, reduced the rate without first finding on evidence, duly recorded, that the accused had no *khalkundi* and no tub on his premises. It was only on such a finding that he could legally hold that the case fell under class F, sub-section 1, of the rules and not under the first part of class F. We reverse the Magistrate's order and direct him to re-hear the case.

Order reversed.

NOTES.

[As regards the remedies of the assessee, see also 23 Bom., 446; 24 Bom., 607; 26 Bom., 294.]

**[11 Bom. 733]
APPELLATE CIVIL.**

The 4th October, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Parvatishankar Durgashankar.....(Original Plaintiff) Appellant

versus

Bai Naval.....(Original Defendant) Respondent.*

*Civil Procedure Code (Act XIV of 1852), Sec. 562—
Remand—Practice—Procedure.*

The defendant in a suit on a mortgage applied, on the day fixed for the hearing, for an adjournment on the ground of illness. Her application was refused, and the Court heard the case *ex parte* and passed a decree for the plaintiff. The defendant appealed to the District Judge, who reversed the decree and remanded the case, on the ground that the defendant's application for an adjournment ought to have been granted. On appeal to the High Court.

[734] Held discharging the order of remand, that the suit having been tried on the merits, the District Judge could not remand the case under section 562, but ought to have proceeded under sections 568 and 569.

THIS was an appeal from a remand order passed by J. B. Alcock, District Judge of Surat.

Suit to recover Rs. 1,199 due upon a mortgage.

The defendant, Bai Naval, widow of Bhavanising Gumansing, applied for an adjournment on the ground that she was ill and had not been able to file her written statement. The Court granted a month's adjournment. On the appointed day the defendant applied for a further adjournment, pleading continued illness and want of assistance as an excuse. The Court rejected the application and proceeded to hear the case. A decree was passed for the plaintiff.

The defendant appealed, and the District Judge reversing the decree remanded the case for trial, on the ground that the defendant's application for adjournment ought to have been granted.

The plaintiff appealed.

Nagindas Tulsiadas Marphatia for the Appellant :—The Judge was wrong in remanding the case. A remand can only be made under section 562 of the Civil Procedure Code (XIV of 1882). The lower Court did not decide the case on a preliminary point. The case was heard, the mortgage was proved by evidence, and the plaintiff's claim on the mortgage was allowed. If there was any defect in the trial, the District Judge ought to have cured that defect himself.

Kalabhai Lalubhai for the Respondent :—The case was decided *ex parte*, and, therefore, it cannot be said to have been decided on the merits.

Sargent, C. J. :—As the Subordinate Judge decided the suit on the merits, and not on a preliminary point, the District Judge could not remand the case under section 562 of the Civil Procedure Code (XIV of 1882), but ought to have proceeded as directed by sections 568 and 569. We must, therefore, discharge the order of the Court below, and send back the case for disposal by the lower appeal Court according to law. Costs to abide the result.

Order discharged.

NOTES.

[This was dissented from in (1906) 30 Mad., 54; see also (1908) 1 I.C., 329 (Oudh); (1896) 23 Cal., 738.]

[735] APPELLATE CIVIL.

The 6th October, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Oriental Loan Association, Limited.....Plaintiffs

versus

George Pelham Hatch and another.....Defendants.*

Civil Procedure Code (Act XIV of 1882), Sec 617—Reference in execution of a decree—Final decree.

A question arising in execution of a decree cannot be referred for the decision of the High Court under section 617 of the Civil Procedure Code (Act XIV of 1882) except where the decree is final.

THIS was a reference made by W. B. Cracknell, Judge of the Consular Court at Zanzibar, under section 617 of the Civil Procedure Code (Act XIV of 1882).

In execution of a decree (No. 461 of 1891) dated the 17th November 1890, passed by the High Court of Judicature at Bombay (Original Side) against George Pelham Hatch and another, a moiety of the pay which Hatch received from the Navab of Zanzibar as the commander of the army and police at that time, was sought to be attached at Zanzibar at the instance of the plaintiffs. The defendant contended that the decree of the High Court was a decree of a foreign Court under section 14 of the Civil Procedure Code (Act XIV of 1882), and that, therefore, it could not be executed, but that the plaintiffs' proper course was to bring a suit upon it at Zanzibar. The Judge of the Consular Court of Zanzibar was of opinion that the decree could be executed by his Court, but submitted the question for the decision of the High Court.

Rivet-Carnac (with *Chalk*) for the Plaintiff :—By section 8 of the Zanzibar Order in Council of 1884, the provisions of the Civil Procedure Code (Act XIV of 1882) have been made applicable to Zanzibar, and by section 21 of the Code the Court at Zanzibar is constituted a District Court of that place under the jurisdiction of the High Court at Bombay. That Court was, therefore, bound to execute the decree passed by the High Court.

Manekshah J. Taleyarkhan for the Defendant :—Assuming that the Court at Zanzibar is a District Court, the Judge of that Court [736] was wrong in making this reference under section 617 of the Civil Procedure Code (Act XIV of 1882). For a reference under that section lies only where the decree is final. But this decree, which was sent for execution to Zanzibar, was not a final decree. It was a decree of a division Court against which there might be an appeal. And an order made in execution of that decree would be a decree under section 244 against which an appeal would lie. The question, therefore, ought not to have been referred.

Sargent, C. J. :—The question referred by the Judge of the Consular Court is one arising in execution of a decree. But section 617 of the Code of Civil Procedure (Act XIV of 1882) only allows of a reference for the decision of this Court in the execution of a decree when the decree was final—which was not the case here. The Judge of the Consular Court must, therefore, decide the question for himself and dispose of the application for execution.

the party aggrieved by it will then have his appeal to this Court. Costs to be costs in the case.

Order accordingly.

NOTES.

[In the C. P. C., 1908, O. 46, r. 1, the words "is not subject to appeal" have been substituted for the word "final."]

[17 Bom. 736]

APPELLATE CIVIL.

The 7th October, 1892.

PRESENT:

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Dattatraya Rayaji Pai..... (Original Plaintiff) Appellant

versus

Shridhar Narayan Pai..... (Original Defendant) Respondent.*

Landlord and tenant—Tenant expending money on land with landlord's knowledge and consent—Standing by—Estoppel—Right of tenant on eviction to be recouped the money so expended Buildings erected on land held under lease—Removal of such buildings.

The defendant entered into occupation of certain land with the permission of the plaintiff, who was the owner, and erected buildings and otherwise expended money upon it. The plaintiff and the defendant were relations and lived near each other. The plaintiff constantly visited the land and knew what the defendant was doing, but made no objection. Subsequently the plaintiff, being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title, induced (but without misrepresentation or fraud) the defendant to sign a rent-note. The Court found that although this rent-note was, in terms, a lease for one year, yet the intention of the [737] parties was not that the defendant should at the expiration of the year, or on any subsequent demand, hand over to the plaintiff the land with the buildings which had been erected by the defendant with the plaintiff's implied consent, without being recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note the defendant had erected other buildings, and that the plaintiff knew of this, and made no objection.

Held, that the plaintiff could not recover possession of the land, or require the removal of the buildings, without recouping the defendant the money he had expended. The plaintiff was estopped from denying the claim of defendant. He had stood by in silence while his tenant had spent money on his land.

THIS was a second appeal from the decision of H. Batty, Acting District Judge of Ratnagiri.

The plaintiff sued to recover from the defendant certain land with arrears of rent for three years. He alleged that the said land formed part of his Inamat Mirache Bag, and that he had let it to the defendant under a rent-note dated 12th April 1881, for one year: that after the expiration of that period the defendant continued to occupy it with his (the plaintiff's) consent, and had erected buildings upon it; that he had subsequently requested the defendant to remove the buildings and to give up the land, but the defendant refused.

The defendant answered (*inter alia*) that the rent-note sued on had been obtained by the plaintiff through misrepresentation. He denied that he was a

yearly tenant of the plaintiff and alleged that he was a joint owner of the land with the plaintiff. He stated that he had built two houses and a stable and had sunk a well on the land with the knowledge of and without objection from the plaintiff, who was, therefore, estopped from requiring the removal of the buildings. He admitted that the stable was erected after the execution of the rent-note sued on, but stated that the other buildings had been erected previously. He contended that the plaintiff was not entitled to possession unless he paid the value of the buildings.

The Subordinate Judge found that the rent-note sued on had not been obtained by any misrepresentation or fraud on plaintiff's part, and he allowed the claim for possession and arrears of rent, with liberty to the defendant to remove the buildings from the land.

[738] The defendant appealed, and the Acting District Judge varied the decree by declaring the plaintiff to be entitled to possession and removal of the buildings only on payment to defendant of Rs. 1,200, the approximate cost of the buildings. In his judgment the District Judge observed :—

"Defendant's witnesses allege that the house was built a long time previous to the rent-note, and the variations and uncertainty among the plaintiffs' witnesses render this not improbable. The bare fact of the value of these buildings seems to this Court to render it very improbable that defendant would have erected them *after* he had not only received a warning from plaintiff, but had consented to execute a *kabulayat*. It is difficult to believe that defendant would expend, as plaintiff's witnesses admit, as much as Rs. 3,000 on land which defendant knew was not his, unless "in the hope or encouragement" by the real owner that he would be allowed to remain in possession long enough to get a return on his expenditure. Plaintiff, in the circumstances of the case, being near at hand and constantly visiting the spot must have known of the erection of these buildings, as would appear from witnesses adduced on his behalf, yet he took no objection. If the buildings were subsequent to the rent-note (which plaintiff says was intended to prevent unauthorized buildings) then the plaintiff's acquiescence would in the case of buildings of such value, be evidence of implied contract.

In the present instance the land does not appear to have been available for agricultural purposes. The buildings were not of a temporary nature, but included a dwelling-house and a well. The works were going on under the plaintiff's eyes. He knew that they were going on, and watched their progress. He took no objection. They were not easily removable. He could not suppose that defendant meant them to be only temporary. They lasted at least for eight years and yet plaintiff did not insist on defendant's giving up the land (cf. 17 W. R., 467). There was not space available for agriculture. And though it seems that, if they were erected after the execution of the rent-note, defendant could only have acted on the belief, which plaintiff did not by any proved objection or notice of ejectment disturb, that there was no intention to prevent their erection. If [739] the buildings were, as defendant alleges, erected before the rent-note was passed, then it would seem that before the defendant recognised the plaintiff's title, plaintiff had allowed him to complete those buildings without raising objection, and the acquiescence and the implied consent of the plaintiff would estop him from asking their removal without giving full compensation (6 Bom. H. C. Rep., 80, and 15 W. R., 161)."

The plaintiff preferred a second appeal.

Daji Abaji Khare for the Appellant (the plaintiff):—The Judge has not distinctly found the date at which the buildings were erected by the defendant and has held that the plaintiff is estopped because he stood by when those

buildings were erected. But the mere standing by does not create an estoppel—*Shiddheswar v. Ramchandrarav*, I. L. R., 6 Bom., 463; *Onkarapa v. Subaji Pandurang*, I. L. R., 15 Bom., 71; *Basawantapa v. Ranu*, I. L. R., 9 Bom., 86. *Ramsden v. Dyson*, L. R., 1 H. L. at p. 170, is in the plaintiff's favour. The lower Court ought to have found as a fact whether the plaintiff did encourage the defendant to erect the buildings. A tenant is bound to give back the land to his landlord in the same condition in which it was when he entered upon it.

Maneksha J. Taleyarkhan for the Respondent:—The plaintiff's case was that the defendant built upon the land after the execution of the rent-note, but the lower Court has not placed any reliance upon this contention. We say that when a landlord stands by and allows his tenant to erect a substantial building on his land, he cannot subsequently insist upon the tenant's removing the building. He is estopped. In such cases the landlord is entitled only to compensation—*Banee Madhub v. Joy Kishen*, 12 Cal. W. R., 495. The effect of the lower Court's finding is that the defendant built upon the land in the *bond fide* belief that the plaintiff would allow the buildings to stand. It is true that when a person wrongfully builds upon another man's land, he should be compelled to remove the buildings; but here the defendant cannot be said to have built wrongfully. It is important to remember that the parties are not strangers to each other. They [740] belong to the same family and live close to each other. In his written statement the defendant says that he *bond fide* believed that the land belonged jointly to him and to the plaintiff.

Daji Abaji Khare in reply.—Even supposing that the defendant erected the houses before the execution of the rent-note, still the very fact that he executed the rent-note ought to have put him on his guard and ought to have prevented him from erecting any new building afterwards. When he passed the rent-note he then at all events became aware that he was merely a tenant, and ceased to labour under a mistake as to his title to the land. If he erected the buildings after the passing of the rent-note, then there is no equity in his favour—*Pulling v. Armitage*, 12 Vesey, 78. *Plimmer v. Mayor, &c., of Wellington*, 9 App. Cas., 699 at p. 711.

Candy, J.:—We think that the District Judge must be taken as having found that the defendant entered into occupation of this land with the permission of the plaintiff; that while he was thus in possession he erected a house at a cost of Rs. 500, and built a well at a cost of Rs. 200; that the plaintiff being a relative of the defendant, and living close at hand, and constantly visiting the spot, knew of the building of the house and well, yet took no objection; that subsequently the plaintiff being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title to the land, induced the defendant to sign the rent-note of 12th April 1881; that in this there was no misrepresentation or fraud on the part of the plaintiff, but that, though the rent-note was, in terms, a simple lease of the land with trees for one year, the intention of the parties could not have been that the defendant should at the expiration of the year, or on any subsequent demand, hand over the land with the buildings, which had been made by defendant with the implied assent of the owner of the land, without being recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note the defendant had erected a "manger" (stable) on the land at a cost of Rs. 500, and that the plaintiff knew of the erection of this building, but made no objection. On these facts the District Judge found that the plaintiff was estopped from denying the [741] claim of the defendant to be recouped the expenditure incurred on the buildings, which must have been built in the hope or encouragement from the

landlord. He, therefore, declared the plaintiff entitled to possession and removal of the buildings only on payment to defendant of Rs. 1,200.

We think that the facts thus found by the District Judge do bring the case within the principles as explained by Lord KINGSDOWN in *Ramsden v. Dyson*, L. R., 1 H. L., at p. 170, and subsequently expounded by the Privy Council in *Plimmer v. Mayor, &c., of Wellington*, 9 App. Cas. at p. 710. Here there are special circumstances—the near relationship of the parties, their residing in close vicinity to each other, their ownership of the surrounding lands—pointing to the presumption that the plaintiff by his conduct sanctioned the construction of the building and well, and afforded hope and encouragement to the defendant that he would be allowed to remain in peaceable possession of the same, or at least would not be ejected without a reasonable return for the expenditure incurred by him.

We think, therefore, that the present case is one in which an equity can be claimed, because the landowner has stood by in silence, while his tenant has spent money on his land; and as there is no dispute as to the way in which the equity should be satisfied, we confirm the decree of the District Judge with costs.

Decree confirmed.

NOTES.

[*Primā facie*, the only right of the tenant erecting buildings on the demised land is to remove them at the end of the tenancy:—(1903) 27 Mad., 211; (1895) 20 Bom., 1; (1895) 20 Bom., 298; (1898) 22 Bom., 1. An estoppel against eviction arises, only if there has been an active encouragement on the part of the landlord and it does not arise merely by not objecting:—(1899) 21 All., 496 P. C.; (1900) 27 Cal., 570; (1899) 1 Bom. L. R., 191; (1910) 8 M. L. T., 258; 37 Mad., 1.]

[17 Bom. 741]

APPELLATE CIVIL.

The 12th October, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

• Narayan Lakshman.....(Original Plaintiff) Appellant
versus

Bapu valad Haibatray and others.....(Original Defendants) Respondents.*

*Registration—Vendor and purchaser—Priority—Notice—Possession—
Subsequent purchaser with notice obtaining possession and paying off
mortgage—Right to recover sum applied in paying off mortgage.*

The plaintiff sued to recover land purchased by him in 1886 from the first defendant, and which was in possession of defendants Nos. 2, 3 and 4. The conveyance to [742] the plaintiff was duly registered. The third defendant claimed part of the land under a previous sale to him in 1885 by the first defendant, the conveyance to him being also duly registered. The fourth defendant claimed the rest of the land under a sale to him by the first defendant subsequent to the sale to the plaintiff of which he had no notice. He relied upon the fact of his having got possession, and he alleged that the purchase-money which he had paid for the land had been applied by the first defendant in paying off a mortgagee who at the date of his purchase was in possession. He claimed, at all events, the repayment of this sum.

Held—(1) that the plaintiff was not entitled to the lands in the hands of the third defendant, the latter being a prior purchaser with a deed of conveyance duly registered;

(2) that the plaintiff was entitled to the land in the possession of the fourth defendant who must be taken to have purchased with notice of the plaintiff's prior purchase, inasmuch as the deed of conveyance to the latter was registered ;

(3) that, if the fourth defendant's purchase-money was applied to pay off a mortgage which plaintiff would otherwise have had to pay, the plaintiff could not equitably recover the land without paying the fourth defendant so much of the purchase-money as was so applied.

SECOND APPEAL from the decision of G. C. Whitworth, District Judge of Khandesh.

The plaintiff sued to recover certain land in the possession of defendants Nos. 2, 3 and 4. He alleged that he had purchased it from the first defendant under a registered deed dated 16th July 1886.

The first and second defendants did not appear.

The third defendant alleged that he had purchased part of the said land on 2nd September 1885, under a registered deed of that date, from one Bhauprasad Khankaria, to whom the land had been formerly sold by the son of the first defendant.

The fourth defendant alleged that he had purchased the rest of the land in December 1887, from the first defendant and his son for Rs. 550 and had got possession ; that he had no notice of the plaintiff's purchase, and that the purchase-money which he had paid had been applied by the first defendant in paying Bhauprasad Khankaria, who had been a mortgagee in possession.

The Subordinate Judge held that the sale to the plaintiff in 1886 was proved, but that the plaintiff could not recover possession as against the third defendant, inasmuch as the latter was in possession under a prior sale to him, and that he could not recover [743] as against the fourth defendant, because the latter, although a subsequent purchaser, had obtained possession.

The plaintiff's claim was, therefore, rejected.

On appeal by the plaintiff the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

Manekshah J. Taleyarkhan for the Appellant (plaintiff) :—Both the lower Courts erred, in law, in holding that so far as defendant No. 4 was concerned we are not entitled to priority, because our purchase, though registered, was not accompanied with possession. Our sale-deed is dated 16th July 1886, and was registered the next day. The sale-deed being registered, the defendant had, when he purchased the property in December 1887, notice of the sale to us, and consequently we are entitled to priority—*Lakshmanlas v. Dasrat*, I. L. R., 6 Bom., 163; *Radhabai v. Shamrav*, I. L. R., 8 Bom., 163; *Agarchand v. Rakhma*, I. L. R., 12 Bom., 678.

Respondents Nos. 1 and 2 (defendants Nos. 1 and 2) did not appear.

Mahadeo Chimnaji Apte for Respondent No. 3 (defendant No. 3):—Both the lower Courts have found that our purchase was proved and was prior to that of the plaintiff. Therefore, he cannot recover the land in our possession.

Dhondu Shamrav Garud (with *Daji Abaji Khare*) for Respondent No. 4 (defendant No. 4):—According to Hindu law a title which is accompanied with possession cannot be over-ridden by a prior title not accompanied with possession. With respect to possession, gift and sale stand on the same footing—*Lallubhai v. Bai Amrit*, I. L. R., 2 Bom., 299; *Kal Das Mullick v. Kanhaya Lal Pandit*, I. L. R., 11 I. App., 218. Registration is not equivalent to possession—*Vasudev Bhat v. Narayan Daji Damle*, I. L. R., 7 Bom., 131.

We have paid off the mortgage of Bhauprasad with our money and, therefore, the appellant should not be allowed to recover possession without

repaying us what we have paid. If we had not [744] paid off the mortgage the appellant would have had to pay it—*Mahomed Shumsool v. Shewukram* L. R., 2 Ind. App., 17.

Manekshah J. Taieyarkhan, in reply:—In *Lakshmandas v. Dasrat*, I. L. R. 6 Bom., 168, the question of possession and registration was fully considered and it was held that registration was equivalent to possession.

Respondent No. 4 is merely a stranger, and it was not incumbent upon him to pay the mortgage. Further, he has not taken an assignment from the mortgagee. Therefore he cannot insist that he should be paid the mortgage amount.

Sargent, C. J.:—The Full Bench decision in *Lakshmandas Sarupchand v. Dasrat*, I. L. R., 6 Bom., 168, followed in *Agarchand Gumanchand v. Bakhma Hanmant*, I. L. R., 12 Bom., p. 678, shows that as the plaintiff's purchase-deed was registered when the fourth defendant purchased, the latter must be taken to have had notice of it, and cannot claim priority by reason of the plaintiff's purchase not having been accompanied with possession. We may remark that in *Lalubhai Surchand v. Bai Amrit*, I. L. R., 2 Bom., p. 299, the earlier purchase without possession was not registered until after the later purchase, so that the effect of registration as giving notice did not arise. However, if the fourth defendant's purchase-money was applied in part in paying off Bhauprasad's mortgage of 1881, which the plaintiff would otherwise have had to meet, the plaintiff cannot equitably recover the property without paying the fourth defendant so much of the purchase-money as was so applied. See *Mahomed Shumsul v. Shewukram*, L. R., 2 Ind. App., 17.

We must, therefore, reverse the decree, except as regards the third defendant, as to whom it must be confirmed, and send back the case for a fresh decision as regards the other defendants. Appellant to pay the third defendant his costs. The other costs of the appeal to abide the result.

Decree partially reversed.

NOTES.

[This was followed in (1902) 26 Bom., 538 ; (1904) P. L. R., 134 ; but not in (1902) 7 J. W. N., 11.]

[745] APPELLATE CIVIL.

The 17th October, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Naik Parsotam Ghola.....(Original Plaintiff) Appellant

versus

Gandrap Fatelal Gokuldas.....(Original Defendant) Respondent.*

Easement—Right of way—Prescription—Prescriptive right of the defendant to have branches of his trees overhanging the plaintiff's land—Right of the defendant to go on to the plaintiff's land to collect the fruit of the trees distinct from and not accessory to the right to have the branches overhanging.

The defendant having acquired a prescriptive right to have the branches of his trees overhanging the plaintiff's land, the lower Courts held that he had a right to go on to the plaintiff's land for the purpose of gathering the fruit of trees, on the ground that the

* Second Appeal, No. 473 of 1891.

prescriptive right to have the branches of his trees overhanging the plaintiff's land carried with it an "accessory" right to enjoy the profits of the branches in the best way possible.

Beld, (reversing the lower Courts' decree) that the right to go on the plaintiff's land to pick the fruit off the branches was perfectly distinct from the prescriptive right to have the branches overhanging the land, and could not be said to be accessory to the latter right in the sense of being within the limits of that right.

SECOND APPEAL from the decision of Venkatráo R. Inamdar, Acting Joint Judge of Ahmedabad.

The plaintiff sued for (1) a declaration that the defendant was not entitled to enter upon the plaintiff's land for the purpose of inspecting his own wall recently erected by him and of taking the fruit of his trees, the branches of which were hanging over the plaintiff's land, and for (2) an injunction restraining the defendant from going upon the land for the aforesaid purposes.

The defendant contended that he had acquired by long user a right of way over the land in question, and that there was no other passage by which he could go and inspect his wall and take the fruit of the trees.

The Subordinate Judge (Rao Sahab N. N. Nanavati) made a decree in the following terms:—

"The defendant has no right to enter the plaintiff's land at all times and on all occasions except during the fruit season and when the necessity arises of removing the branches or wood or repairing the wall, &c., and that the defendant do enter the plaintiff's land [746] at such times with plaintiff's permission which the plaintiff should not refuse."

Against the above decree the plaintiff appealed to the District Court, and the defendant preferred cross-objections under section 561 of the Civil Procedure Code (Ac. XIV of 1882).

The Acting Joint Judge found on the issues that (1) the defendant had a right to pass over the plaintiff's ground and that (2) with respect to the nature of that right there were "no sufficient materials on the record to prove the absolute right alleged by the defendant."

The Judge, therefore, confirmed the decree, observing:—

"The trees in question are very old ones, and their branches have been extending far over the plaintiff's land for upwards of forty or fifty years. * * His predecessors in title were entitled to prevent the extension of these branches on the plaintiff's land. This right carried with it the accessory right to enjoy the profits of the branches in the best way possible, and this right could not be enjoyed except by passing over the plaintiff's land when necessary. In this view I think that the defendant is entitled to pass over plaintiff's ground for the purpose of exercising the above right, and for inspecting his walls, &c., on that side, and such other rights as might be necessary. * * "

The plaintiff preferred a second appeal.

Chimanlal H. Setalvad, for the Appellant (plaintiff):—We allowed the branches of the defendant's trees to hang over our land, because they caused no inconvenience to us; but our allowing the branches to overhang cannot give to the defendant the right to come on our land to pluck fruit and inspect his wall. The wall was built by the respondent on his own land so late as 1882. The wall belongs to him exclusively, and if he wishes to inspect it, he may do so without coming on our land.

Rao Sahab Vasudev Jayannath Kirtikar (Government Pleader) for the Respondent (defendant):—The lower Courts held that we are entitled to go on the plaintiff's land as an accessory right to enjoy our property. If we have acquired a right—and the lower Courts have found that we have—to have our

branches overhang-[747] ing the plaintiff's land, then we say that we have also acquired the right of going over his land to remove fruit from the overhanging branches—*Esubai v. Damodar*, I. L. R., 16 Bom., 552. In fact, we claim a right of way over the appellant's land.

User amounting to a license would be in the nature of an easement, though it cannot amount to an easement strictly so called.

Sargent, C. J.:—Both the Courts below have found that the defendant had acquired a prescriptive right to have the branches of his trees overhanging the plaintiff's land, and that the evidence failed to establish any prescriptive right of way in defendant over the plaintiff's land; but they have held that he has a right to go on plaintiff's land for the purpose of gathering the fruit of the trees, on the ground that the prescriptive right to have the branches of his trees overhanging the plaintiff's land carried with it as "an accessory" the right to enjoy the profits of the branches in the best way possible which could not be done except by passing over the plaintiff's land. We cannot agree in this conclusion. The right to go on the land of the plaintiff to pick the fruit off the branches is perfectly distinct from the prescriptive right to have those branches overhanging the land, and cannot be said to be accessory to the latter right in the sense of being within the limits of that right, however useful and even necessary it might be to the defendant in order to obtain the full enjoyment of the profit of the branches so overhanging.

As to the right of the defendant to go on the land to repair the wall, it is not apparent on what ground the lower Court of appeal has granted it. The wall is not a common wall or a wall which plaintiff is bound to keep in repairs, and if defendant wishes to repair it he must do so without trespassing on his neighbour's land.

We must, therefore, reverse the decree of the Court below and make a declaration as prayed for, and restrain the defendant by injunction from entering the plaintiff's land for the purposes mentioned in the plaint. Appellant to have his costs throughout.

Decree reversed

[748] CRIMINAL REVISION.

The 17th October, 1892.

PRESENT:

MR. JUSTICE PARSONS AND MR. JUSTICE TELANG.

*In re Ratanlal Rangildas.**

Criminal Procedure Code (Act X of 1882), Secs. 517 and 523—Property seized by the police pending an inquiry or trial under a search-warrant issued by the Court—Magistrate's power to deal with such property where no offence is committed

Section 523 of the Code of Criminal Procedure (Act X of 1882) does not apply to property which is produced before a Court in the course of an inquiry or trial under a search-warrant issued by itself under section 96 of the Code. To such property section 517 alone would apply; and if no offence is found in respect thereof, the Court can make no order. The property must be given back into the possession from which it came.

The scope of section 523 must be confined to property seized by the police of their own motion in the exercise of the powers conferred on them by law, for instance under section 51, 54, 164 or 165 of the Code of Criminal Procedure.

Per TELANG, J.—Under section 523 of the Code of Criminal Procedure a Magistrate is bound to institute an inquiry before making any order touching the right, not of property, but of possession to the property, seized by the police.

APPLICATIONS under section 435 of the Code of Criminal Procedure (Act X of 1882).

The facts of the case were as follows:—One B. Gulab filed a complaint in the Court of the First Class Magistrate of Surat against Itcharam Rasikdas and Utamram Itcharam, charging them with criminal breach of trust in respect of certain ornaments and jewellery which had been entrusted to them for sale.

In execution of a search-warrant issued by the Magistrate under section 96 of the Code of Criminal Procedure (Act X of 1882) the police seized certain jewellery which was in the possession of one of the applicants, Ratanlal Rangildas.

The other applicant, Itcharam Valabh, made over to the police, as soon as they appeared with a search-warrant, certain gold ornaments which he alleged had been pledged with him by one of the accused.

The Magistrate, after trying the case, discharged the accused, finding, on the evidence before him, that there had been a trust, but no criminal breach of trust committed by the accused.

* Criminal Review, No. 313 of 1892.

† [Sec. 96:—Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, paragraph one, has been or might be addressed, will not or would not produce the document or other thing as required by such summons or requisition,

or where such document or other thing is not known to the Court to be in the possession of any person,

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search warrant; and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained.

Nothing herein contained shall authorize any Magistrate, other than a District Magistrate or Chief Presidency Magistrate, to grant a warrant to search for a document in the custody of the Postal or Telegraph authorities.]

[749] As regards the property produced seized by the police, the Magistrate in the course of the trial, and without holding any inquiry, passed an order, under section 523 of the Code of Criminal Procedure, that it should be delivered to the complainant.

The order was as follows :—

" I now proceed to dispose of the property* seized by police under circumstances which create suspicion of the commission of an offence under section 523 of the Criminal Procedure Code. All the property seized is amply proved to belong to complainant, and most of it, especially the jewellery, has been admitted to be complainant's property. I therefore order the whole of the property produced in Court should be restored to the complainant after one month, i.e. after the expiry of the period of appeal."

Against this order the applicants, from whose possession the property had been taken by the police, appealed to the Sessions Judge, but he declined to interfere, on the ground that the Magistrate was right in making the order under section 523 of the Code of Criminal Procedure.

Thereupon the applicants applied to the High Court under its revisional jurisdiction.

Ganpat Sadashim Rao, for Applicants :—Section 523 of the Code of Criminal Procedure does not apply to the present case. It does not apply to property seized by the police under a search-warrant issued under section 96 of the Code. In such a case the seizure by the police need not be reported to the Magistrate, as the seizure is made under his own orders. Section 523 applies only to the cases expressly specified therein. The present is not one of those cases. That being the case, the property should be restored to the persons from whose possession it was taken in the course of the trial. *In re Annapurnabai*, I. L. R., 1 Bom., 630; *Queen-Empress v. Kusa kom Laksmanan*, Cr. Rul., 24th April 1884; *Queen-Empress v. Ahmal*, I. L. R., 9 Mad., 418. But, assuming that section 523 governs the present case, the Magistrate is bound under the section to make an inquiry as to the person who is entitled to possession before making any order for the disposal of the property. This inquiry has not been made in the present [750] case. The Magistrate has ordered the property to be given to the complainant, merely because he finds she is the owner of it. This is clearly wrong. Under the section, the Court has to determine who has the right to the possession of the property. In the present case the right to the possession is vested in the applicants, who have a lien on the property in dispute.

Branson (with him *Narindas Tulsidas*), for Opponent :—The Magistrate was right in ordering delivery of the property to the complainant, who is the owner. She alone is entitled to the possession of the property—*Queen-Empress v. Joti Rajnak*, I. L. R., 8 Bom., 338. The ruling in *In re Annapurnabai*, I. L. R., 1 Bom., 630, was passed under the old Code of Criminal Procedure. Section 523 of the new Code is wider than section 415 or 416 of the old Code. Under the new enactment the Magistrate is at liberty to make an order for delivery of the property to the person he thinks entitled. If section 523 does not apply, then I contend section 517 is applicable. Under both these sections the Magistrate has a wide discretion in making an order for the disposal of property. With that discretion this Court will not interfere in the exercise of its revisional jurisdiction, but will leave the aggrieved party to assert his rights in a Civil Court. Refers to *Queen-Empress v. Tribhovan*, I. L. R., 9 Bom., 131.

Parsons, J. :—The facts are these. Bai Gulab brought a charge of criminal breach of trust against certain persons. The Magistrate to whom the complaint was made, issued search-warrants under section 96 of the Code of

Criminal Procedure (X of 1882) and the property now in question was found in the possession of the applicants and produced before the Magistrate. The Magistrate, though the persons in whose possession the property was found were not the accused persons and though he found that no offence had been committed regarding it, ordered it to be delivered to the complainant. He held no independent inquiry, and he does not find that the complainant was entitled to the possession, but merely that she is the owner, of the property.

The first point that arises is whether his order was made with jurisdiction. For if it was not, we are bound to interfere and set it aside; whereas if it was, other points may have to be con-[751]sidered. The order was not and could not have been made under section 517 of the Code, but it is sought to be supported under section 523, under which section it purports to be made. In my opinion, this section is in no way applicable. It cannot, I think from its very words, be held to apply to property which is produced before a Court in the course of an enquiry under a search-warrant issued by that Court. Its scope must be confined to property seized by the police of their own motion, in the exercise of powers conferred on them by law, and which seizure requires to be reported to a Magistrate, since otherwise the Magistrate would have no knowledge of it. For instance, the seizure of articles found on an arrested person searched under section 51, the seizure under section 54 (4) of property suspected to be stolen or with which an offence is suspected of having been committed, the seizure of property under section 165 or under a search-warrant issued under section 165 or section 166 would have to be reported. But there would be no necessity to report the seizure of property found under a search-warrant issued by a Magistrate, since, by the terms of the search-warrant itself, the property has to be placed before the Magistrate. Section 523 is silent as to any such property. Strictly speaking, section 517 and section 523 cannot both apply to the same property. Section 517 ought to apply to all property produced before a Court in an inquiry or trial, while section 523 would apply to property not so produced, but still in the possession of the police who had seized it, but to whom the Legislature did not see fit to entrust the disposal thereof, and so conferred that power on the Magistracy alone. The Calcutta High Court has ruled apparently that section 523 does not apply to any property which has been the subject of a criminal trial (Ruling of September 7th, 1845, quoted in Prinsep's 9th edition of Criminal Procedure Code, page 358). I will not, however, go so far as that. It is unnecessary to do so in the present case, and possibly, I think, at the end of an enquiry or trial, there might be some property seized by the police to which section 523 might apply. Our criminal ruling (No. 7 : *Imperatrix v. Gopala*) of 12th February 1891, appears to imply that. I have no doubt that section 523 can have no application to property produced in the course of an [752] enquiry or trial before a Court under a search-warrant issued by itself. To such property section 517 alone would apply, and if no offence is found in respect thereof, the Court can make no order; it must be given back into the possession from which it came. I find, therefore, that the order was made without jurisdiction, and my learned colleague agrees with me. We, therefore, reverse the order of the Magistrate respecting the property in the case in question. The effect of this will be that the property must be restored to the possession of those persons who gave it up, or from whom it was taken.

Telang, J. :—These were applications made in the extraordinary jurisdiction of this Court for the purpose of obtaining revision of certain orders for the custody of property made by the First Class Magistrate of Surat under section 523 of the Criminal Procedure Code. The principal prosecution in which the

question regarding the property in dispute arose was one instituted by Bai Gulab against Itcharam Basikdas and Utamram Itcharam for criminal breach of trust, and the Magistrate being of opinion that though a trust was proved, a dishonest breach of it was not proved, discharged the accused persons. The applicant in the first of these cases was the partner of one of the accused persons, and the property in question on his application was found by the police in the course of a search held under a search-warrant granted by the Magistrate in accordance with the provisions of section 96 of the Code of Criminal Procedure. In the second case the applicant was the pledgee of certain articles of jewellery from a person to whom they had been pledged by one of the accused persons. The complainant had applied to the Magistrate for a search-warrant as regards him also, but the order of the Magistrate was that he should in the first instance be asked to hand over the things, and in the event of his refusal the search-warrant should be executed. The applicant, it was stated before us, produced the things to the police on their demanding the same, and they went in due course to the Magistrate's Court. Under these circumstances the Magistrate ordered that the various articles and things taken from the possession of the applicants should be handed over to the complainant, Bai Gulab, and he made the order under the provisions of section 523.

[753] I am of opinion that section 523 has no application to such a case as the present. Comparing the provisions of that section with those of section 96 and other sections of the Criminal Procedure Code, I am of opinion that section 523 only deals with cases in which the police seize property, as they are in some cases authorised to do, by virtue of their own powers, and not in carrying out any order of a Magistrate. The general nature of the provisions of that section coupled with the specific provision for a report to a Magistrate points, I think, most strongly to a seizure by the police of their own authority. The seizures in the present cases were clearly not of that character. That in the case of Ratanlal was under a search-warrant granted by the Magistrate under section 96, which contains its own special enactment as to the nature of the proceeding to be taken before the Magistrate on the finding of the property under the warrant. That in the case of Itcharam Valabh was also a seizure under the order of the Magistrate made apparently under section 94 of the Code. In both cases I think the section 523 under which the Magistrate professed to act, was inapplicable.

But it was said that section 517 in any event afforded adequate authority for the order made by the Magistrate. I do not, however, perceive how section 517 could be applied to the case. That section, in terms, deals with property in respect of which an offence may appear to have been committed. In this case the Magistrate by discharging the accused on the ground that no criminal breach of trust had been proved to his satisfaction must be taken clearly to have found that no offence had been committed. Mr. Branson argued that the Magistrate's finding was illogical, and that one could see from his judgment that he thought the accused had not dealt properly with the complainant. I do not think, however, that there is anything necessarily illogical in the judgment of the Magistrate. He apparently seems to have thought that the accused had not dealt properly with the complainant, but that their acts amounted not to a criminal offence but to a civil wrong. But in any event it is plain, I think, that the property in this case cannot be treated as property in respect of which an offence appears to have been committed, [754] because the only persons charged or chargeable with the offence have, in fact, been discharged, and that finding which we have already refused to disturb is, while it stands, equivalent to a finding that no offence has been committed.

The Subordinate Judge found that the defendant was a trustee for the plaintiffs; that they were minors at the time when the deed was alleged to have been executed, and that the deed was invalid, there being no consideration for it. The claim of the plaintiffs was, therefore, allowed.

[757] On appeal by the defendants the District Judge confirmed the decree with the following remarks:—"As to the sale to the deceased defendant there is no doubt it took place, but the consideration is doubtful, the witnesses know nothing of this consideration, nor can they distinctly state that the ladies were actual executants of the sale-deed. * * * On the whole I think that the lower Court was correct in holding that the deceased defendant was actually a trustee in charge of the property, so that the claim is not time-barred, that the sale to him can be set aside as invalid and fraudulent, as having been made to the trustee himself while the owners were minors, and on this view the appeal is dismissed."

Defendant No. 1 preferred a second appeal.

Vasudeo Gopal Bhandarkar, for the Appellant (defendant):—The sale-deed to the defendant is dated 6th October 1876, and he has ever since been in adverse possession. The suit is now barred. The defendant was not a trustee. The plaintiffs should have sued to cancel the deed within three years after they attained their majority. He cited *Ram Janki Kunwar v. Raja Ajit Singh*, L. R., 14 Ind. Ap., 148, and *Hasan Ali v. Nazo*, I. L. R., 11 All., 456.

Mahadeo Chimnaji Apte, for the Respondents (plaintiffs):—Both the lower Courts have found that the defendant was a trustee, and that there was no consideration for the deed. The defendant being a relation, the property was given into his management. There was no adverse possession until the year 1888, when the deceased defendant declined to give the plaintiffs possession.

Vasudeo Gopal Bhandarkar in reply:—The deed being executed by the minors and registered, it would be binding upon them until it is formally set aside. A deed executed by a minor is, no doubt, voidable, but unless and until he avoids it, it is binding upon him—*Harnant v. Jayarao*, I. L. R., 13 Bom., 50; *Sashi Bhusan Dutt v. Jadu Nath Dutt*, I. L. R., 11 Cal., 552; *Mahamad Arif v. Saraswati Debya*, I. L. R., 18 Cal., 259; Pollock on Contracts, (5th Ed.) pp. 55, 60.

[758] **Sargent, C. J.**:—Supposing the deed not to have been executed at all, as the Subordinate Judge has found, the period for recovering possession by the minors would not run until the possession by the manager became adverse, and that would not be until the manager distinctly repudiated the management. Again, if it was executed by the ladies only, article 144, and not 91, of the Limitation Act would apply. See *Sikherchand v. Dulputty*, I. L. R., 5 Cal., at p. 370, and *Bhagwant Govind v. Kondavalad Mahadu*, I. L. R., 14 Bom., 279. And even if the minors, whose names appear on the deed, actually executed it, still as the defendant did not get into possession under it, and only uses it to defend his position, article 91 would not apply, on the authority of *Boo Jinatboo v. Sha Nagar Valab Kanji*, I. L. R., 11 Bom., 78. Therefore, in any case the suit would not be barred, and the decree must, therefore, be confirmed, with costs.

Decree confirmed.

NOTES.

[See also (1908) 32 Mad., 72; (1911) 13 I. C., 852 (Punjab).]

[17 Bom. 758]
APPELLATE CIVIL.

The 19th October, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE TELANG.

Manilal Rewadat.....(Original Defendant) Appellant

versus

Bai Rewa.....(Original Plaintiff) Respondent.

Hindu law—Inheritance—Stridhan, devolution of—Woman's estate apart from stridhan, devolution of, according to Mayukha—Property inherited by a woman from a male owner—Property not of the class called "stridhan proper"—Reversion on her death to heir of last male owner—Theory of such reverter not to be extended to stridhan—Meaning of expression "sons and other heirs" used in Mayukha, Ch. IV, Sec. 10, pl. 26—"Sons and the rest," meaning of—Decree for maintenance obtained by wife against her husband—Appeal by husband against decree—Death of wife pending appeal—Daughter to be legal representative of the deceased for the purpose of the appeal—Practice—Procedure

In cases to which the Vyavahara Mayukha is applicable, a woman's daughter and not her husband is the heir to her property, although not of the kind belonging to the class of 'stridhan proper.'

The doctrine that property which has been inherited by a woman should revert on her death to the heirs of the last male owner is not to be extended to the devolu-[759] tion of stridhan. The heirs to succeed are the heirs to the woman herself, though her heirs in the husband's family.

The phrase "sons and the rest" in Chapter IV, section 10, placitum 26 of the Mayukha means merely "sons, grandsons and great-grandsons," and the phrase "daughters and the rest" in placita 14, 23 and 24 means "daughters and their issue" as contrasted with "sons, grandsons and great-grandsons."

As regards property which does not class as woman's property in the technical sense, the "sons and the rest" take precedence over the "daughters and the rest." Failing both sons and daughters the heirs to "stridhan proper" and "stridhan improper" are identical, save that as between male and female offspring the latter have a preferential right as regards "stridhan proper," while the former have a similar right as to "stridhan improper."

The author of the Mayukha, like the author of the Mitakshara, does not regard the enumeration of specific kinds of stridhan in the old Smriti texts as exhaustive. He includes under the name all that by law becomes the property of the woman, only (unlike the author of the Mitakshara) he distinguishes the specific kinds enumerated in the texts from those which are not so enumerated for purposes of inheritance. In doing this it seems quite reasonable to lay down that, as regards that class of property which is emphatically woman's property being expressly so named by the old sages, the female offspring should take precedence over the male; while as regards that which is not such, the general preference given to male offspring over female by Hindu law should have effect. On the other hand there is no obvious reason why in the case of collateral relations any similar distinction should be maintained between the two classes.

Under the rule of succession above stated, the woman is recognized as a fresh source of devolution. It is to be remembered that the property with which the rule in question deals, is not merely that which the woman obtains by inheritance, but may include that which has never belonged to her husband or any other relation, either on the husband's or the father's side, but is her own original acquisition. Such property is the woman's property; it is not the husband's property. Why, then, should it go on her death to any one except to those who are the woman's heirs, and how can the rule about the last male owner be made applicable to such property at all?

A Hindu wife obtained a decree against her husband for maintenance. He appealed, and while the appeal was pending the wife died, leaving two daughters. The question then arose whether her husband or his daughters should represent the deceased in the appeal.

Held, that the daughters of the deceased were the legal representatives for the purposes of the appeal.

This was an appeal from an order passed by E. M. H. Fulton, District Judge of Ahmedabad.

The plaintiff sued her husband to recover arrears of maintenance and also to obtain an order for future maintenance for herself and her two minor daughters, Divali and Rukmini. The Subordi- [760] nate Judge awarded the claim, directing the defendant to pay the arrears and to continue to pay maintenance in future at a certain rate.

The defendant appealed, and pending the appeal the plaintiff recovered the amount of the maintenance on giving security in execution of the decree. Before the appeal came on for hearing, the plaintiff (respondent) died. The appellant (defendant) then applied to have her (the respondent's) surety placed on the record as her representative, but the application was refused.

The appellant then applied to place on the record the names of the respondent's two daughters as her representatives on the ground that they were entitled to succeed to her *stridhan*, if any. This application was also refused, the Judge being of opinion that under the Mayukha, which was the authority applicable to this case, the daughter inherited the *stridhan* of the mother only when it belonged to one of the six classes specially mentioned, and that the right to maintenance, which was the alleged *stridhan* in this case and which was the subject of the appeal, did not belong to any of those classes and, therefore, did not descend to the daughters, but to the husband. In his judgment he said:—

"Before the hearing of the appeal which her husband had brought she (Bai Rewa) died. He then applied to have her surety made respondent for the purpose of carrying out the appeal, but the application was refused."

"He has now applied to enter the names of the deceased's minor daughters on the ground that they are entitled to succeed to her *stridhan* if she has any. It is not, however, alleged in the application that any such *stridhan* exists. In Gujarat, according to the Mayukha, the *stridhan* to which a daughter is entitled in preference to other heirs is the six-fold property specially enumerated. In respect of other property, the husband and not the daughters are the heirs, the presumption being (in the absence of allegation or proof to the contrary) that the marriage was in one of the approved forms. The subject-matter of this suit, namely, money to which the wife may have been entitled as maintenance, is property of that other kind of which the husband is the heir. [761] The daughters, therefore, are not the legal representatives of the wife for the purposes of this suit."

The defendant appealed against this order.

Gokuldas K. Parekh for the Appellant:—"The Judge was wrong in holding that the daughters are not the legal representatives of the deceased with

respect to the property in dispute. The sum awarded for the maintenance of a female may or may not be included in the category of *stridhan* technically so called; still it is *stridhan*, and being *stridhan* the persons entitled to succeed to it are her heirs and not the heirs of her husband—Vyavahara Mayukha, Ch. IV, sec. 10, pl. 24–28. The Mayukha is not quite explicit on the point. For the purpose of determining what is meant by the expression "legal representative" of a female, the passages from the Mitakshara and the Mayukha bearing on the point may be read together.

Chimanlal H. Setalvad for the minor Respondents (the daughters).—We rely upon *Vijarangam v. Lakshuman*, 8 Bom. II C. Rep., O. C. J., 944; West and Bühler, pp. 150, 151; Banerji's Law of Marriage and Stridhan, p. 443. The words in the Mayukha are *putradayah* (sons and others), that is, sons and other heirs succeed in the case of a non-technical *stridhan*. This excludes the idea of daughters coming in. There is a distinction as to succession in the case of a technical *stridhan* and non-technical *stridhan*. The amount of *stridhan* being not a technical *stridhan*, the daughters cannot succeed. In the present case there being no sons, the husband is the heir of the deceased. The daughters being expressly excluded by the expression *putradayah*, they cannot succeed under the rules relating to non-technical *stridhan*, but they may come in as heirs to such property under the general law relating to inheritance if there is no other heir in existence.

Telang, J. :—The question which directly arises in this case is as to the person entitled to represent a deceased woman in an appeal filed by her husband against a decree for maintenance obtained by her. The right to such representation would depend on the right of inheritance. And the maintenance money being admitted on both sides not to be of the class called "*stridhan* [762] proper" by the Vyavahara Mayukha, which is the authority applicable to the case, the question to be decided assumes this form: Is the husband of a deceased woman, or her daughter, the preferential heir, according to the Vyavahara Mayukha, to that woman's property, not being property of the kind which classes as "*stridhan* proper"?

The solution of this question depends on the true construction of the Vyavahara Mayukha, Chapter IV, section 10, placitum 26* a passage which must be at once admitted to be extremely obscure, and which two of our most important text books on Hindu law have proposed to interpret in two absolutely irreconcilable ways. In West and Bühler's Digest, pp. 150-1, the opinion expressed on the point is identical with that which in *Vijarangam v. Lakshuman*, 8 Bom. H C. Rep., (O. J.), at p 260, WEST, J., put forward when he spoke as follows in regard to the construction of that passage: "Inherited property, Nilakantha says, though it is *stridhan*, not being one of those kinds

* Placita 24 and 26 of the chapter of the Mayukha referred to run as follows :—

24. This right of inheritance, of daughters and the rest, in the mother's property, exists only in the wealth given before the nuptial fire (*Adhyagni*), and in the bridal procession, (*Adhyavahanika*) and the other (kinds) above recorded in the texts (paras. 1-2-3) specifying woman's property; for, if relating to all wealth in which their mother has any property, it would go to set aside those texts (limiting it to six.)

The right of the daughters and their issue, confined to the six kinds of property.

26. However, the text of Yajnavalkya, "Let sons divide equally both the effects and the debts, after (the demise of) their two parents", relates to (what is) acquired by the act of partition and the like with the exception of that declared in the above texts (as woman's property). From this it is clear that, if there be daughters, the sons or other heirs even succeed to the mother's estate, distinct from that part before described (as woman's property.)

Woman's property is an exception to the general right of sons. OLIX.

of *stridhan* for which express texts prescribe exceptional modes of descent, goes, on the woman's death, to her sons and the rest, as if she were a male, and this too notwithstanding her having left daughters (Vyay. May., Ch. IV, see X, pl. 26). The passage which sets forth this doctrine being somewhat obscure in Mr. Borradaile's translation, it may be as well to say that its true purport is this:—"It is clear [763] that although there be daughters, the sons or other heirs still succeed to the mother's estate, so far as it is distinct from the part already described (as subject to peculiar devolution under texts applicable to particular species of *stridhan*)".

On the other hand, Mr. Mayne says that "it is very questionable whether Nilakantha meant anything of the sort," and he states his own interpretation of Nilakantha's views in the following words:—"The meaning of this appears to me to be, "the mother's estate does not descend according to the rules applicable to *stridhan*; but is taken by such heirs, being sons or otherwise, as would have taken it, if the accident of its falling to a woman had never occurred. Where, therefore, the property had come to the mother from a male, it would return to the heirs of that male." On the best consideration that we have been able to bestow on this subject, we have been compelled to come to the conclusion, that neither of these interpretations of the Vyavahara Mayukha is correct.

Dealing first with Mr. Mayne's view, we confess, we are unable to see in the opinion of Nilakantha anything whatever to show that he regarded the devolution of property on a woman as an "accident," or that he adopted the doctrine that on that accident ceasing by the death of the woman, the property should revert to the heirs of the last male owner. This doctrine of reverting to the heirs of the last male owner is one which is nowhere expressed, as far as we are aware, in either the Mitakshara or the Mayukha. It appears to be a doctrine of Jimitavahana. And although, in consequence, probably, of the early Privy Council decisions pronounced in Bengal cases having been applied to cases arising in other provinces, this theory of reverting has been authoritatively laid down in one or two other instances, we do not think that it is necessary or allowable to introduce that conception into the theory of *stridhan*, without some basis for it being found in the original authorities. We are not aware of any such basis. On the contrary, we are of opinion that Nilakantha, at all events, discards that conception in one passage in clear and express terms. In Chapter IV, section 10, placitum 23, in dealing with the devolution of *stridhan* in default of the [764] husband, Nilakantha states the view of the Mitakshara, which might be supposed to be that it goes to the husband's relations as such, and then proceeds to point out that such a supposition would be incorrect, and finally lays it down that the Mitakshara must be construed in a sense identical with his own opinion, which is that the heirs to succeed are the heirs to the woman herself, though her heirs in the husband's family. He expressly refers to the general rule laid down by Manu in Chapter IX placitum 187, and deduces from it the conclusion, that it is propinquity to the deceased which creates the right to take the property of the deceased. It appears to us that this conclusion and the grounds on which it is rested are alike inconsistent with the theory propounded by Mr. Mayne. Again, it is to be remarked that, on Mr. Mayne's construction, as far as we are able to make it out with precision, the phrase used by Nilakantha "the sons or other heirs," which Mr. Mayne paraphrases by "such heirs, being sons or otherwise," is not to be understood as expressing the relationship to the "mother" whose estate is in question, but to a previous male holder. Unless this is so, we cannot perceive how the theory of a reverter can be spelt out of the passage under discussion. But if this is the

true interpretation of Mr. Mayne's view, we are bound to say that it is, in our opinion, entirely inconsistent with the actual language here used by Nilakantha, which necessarily requires that the relationship of "daughters" on the one hand and of "sons or other heirs" on the other, must be traced to the same *propositus*, viz., the "mother" whose estate is in question. Further, it is not unworthy of note, that, as expressed, this rule of Nilakantha, on Mr. Mayne's construction as above interpreted, can only apply where a woman has succeeded by inheritance to the property of a previous holder, to the exclusion of the other "heirs, being sons or otherwise" of such previous holder. But ordinarily the only case in which such an exclusion of sons, &c., by a female heir would occur, would be in the case of property descending, as *stridhan* for example, to one woman from her mother or grandmother. If there are other cases, they must be very rare indeed. If so, this passage affords an extremely narrow foundation, if it affords any foundation at all, for a rule about a reverter to the [765] heirs of the last male holder. On such grounds as these, we are unable to accept the interpretation put by Mr. Mayne on the passage under consideration.

As regards the other interpretation, it must be observed, in the first place, that we are told in the Digest itself, that how the rule "is to be worked out in detail is not laid down." And it is obvious that at the very outset we are encountered by a difficulty. The list of heirs referred to for the purposes of the rule comprises a widow. When, therefore, the rule is to be applied to a female *propositus*, a modification of this becomes absolutely essential, and the suggestion has then to be made, that that word should be taken to signify the analogous relationship, and must be held to mean "husband" for the purposes of this adaptation of the rule. This, we confess, appears to us to be a great difficulty, and we are unable to recall any similar case of the use in any of our books of a class name with the word "*adhi*," &c., where any similar modification is found to be necessary. Secondly, it is to be noted, that the words "as if she were a male" are *not* Nilakantha's. We presume that they are introduced as explanatory of the phrase "the sons and the rest," which is understood as referring to the whole group of heirs of a separated male householder from "sons" down to the end of the so-called "compact series." We shall, in the sequel, show that it is unnecessary to interpret the words "the sons and the rest" with reference to the list of heirs of a separated householder. But here we may point out one slight difficulty in addition to that already indicated in the way of that interpretation. The whole succession of heirs comprised under that phrase is not, in fact, grouped together as one class by the Vyavahara Mayukha in the place where it is first laid down for its principal and direct purpose. The lineal male descendants, who come at the head of that line of succession, are dealt with separately and by themselves under the head of unobstructed heritage, which is laid down as a separate branch of heritage. The succession of a widow and the subsequent heirs is dealt with separately under the head of obstructed heritage, and in the Vyavahara Mayukha itself these two parts of the line of succession are separated by a discussion of questions connected with partition and with impartible pro-[766]-perty. We do not think this circumstance to be by any means conclusive, but we think it is of some importance in deciding whether, as supposed, Nilakantha had in mind an ideal group which he has not himself described or treated of as one integral group anywhere else.

We think that, looking at the whole course of the discussion of which Chapter IV, section 10, placitum 26, forms a part, the phrase "sons and the rest" has really a much narrower scope and extent than is attributed to it in the interpretations proposed by Mr. Mayne and in West and Bühler's Digest.

The phrase appears to us to mean "sons, grandsons, and great-grandsons" and no more. From placitum 13 of section 10 the discussion commences with respect to succession to a woman's property. And down to placitum 27 various points relative to such succession as between the offspring of the deceased woman *inter se* are considered. In some cases, it is said the male offspring or sons inherit jointly with the female offspring; in others the latter entirely exclude the former; in still others, the former exclude the latter. This will be seen to be the main topic discussed in the placita referred to. Doubtless some minor matters are also considered. But that is the main point. And after exhausting that part of the discussion, Nilakantha, in the later placita from placitum 27 onwards, proceeds to deal with the rights to woman's property of other heirs than the lineal descendants, male or female, of the deceased woman. It seems to us that this general view of the scope of the different parts of the section under consideration shows that the phrase referred to is probably confined in its intention to the limits above indicated. An examination of the placitum in detail supports that conclusion. Placitum 13, adverting to two particular species of *stridhan*, lays it down that the woman's "children" succeed to it. Down to placitum 16 this general rule is explained and certain distinctions and modifications are stated. In placitum 17 a rule is laid down about another of the specific classes of *stridhan*, giving it to the unmarried daughter alone. In placitum 18 all classes of woman's property other than those specifically provided for in the previous placita are dealt with, and said to go to the daughters. The subsequent placita down to placitum 25 state the necessary [767] details connected with that topic, and in placitum 25 it is distinctly pointed out that all these rules relate to *stridhan* technically so called. In placitum 26 woman's property not of the technical class is dealt with, and it is said that here the sons and the rest take it even if there are daughters. Placitum 27 then proceeds to give the rules regarding the devolution where there is no offspring of either sex; thus further implying what has been already shown, that the previous placita were intended to deal only with the respective rights of offspring male or female, where they exist.

Again, if we look at the use of the word "*adī*" in the course of this discussion, we shall find the same conclusion strengthened. In placitum 14 we have the phrase "daughters and the rest;" in default of them we are told son are to succeed. Clearly the word *adī* there must, in our opinion, be limited to the issue of the daughters in the sense elsewhere explained. In placitum 23, we have the phrase "daughters and the rest" again; and again it can, we think, be only interpreted in the limited sense here indicated. We have in the same placitum the phrase "sons and grandsons and the rest take the property," and the authority cited for the proposition only refers in terms to "sons." It seems, therefore, to follow that the phrase there can only mean "sons, grandsons and great-grandsons." Again, in placitum 21 we have "daughters and the rest" once more. And the context shows that that means daughters and their issue as contrasted with sons, grandsons and great-grandsons. Lastly, we have "sons and the rest" in placitum 26. And we can see no reason why the phrase should be construed differently from "sons, grandsons and the rest" in placitum 23, while on the other hand the whole context, we think, requires that construction to be adopted.

Again it is to be observed that the rule under consideration is deduced by the author of the *Māyukha* from the text of *Yajñavalkya* quoted in placitum 26, in which only sons are named. That text, in its application to the estate of the father, is quoted by the *Vyavahara Māyukha* at Chapter IV, section 4, placitum 17 (Stokes, page 52). That passage occurs in the section relating to

unobstructed heritage, and is, therefore, confined to the rights of the lineal male descendants—sons, grandsons and great-grand-[768] sons. It has no connection there with the succession of the heirs comprised in the "compact series" beginning with the widow. That circumstance also appears to us to afford some indication of the limits within which the meaning of the word *adi* in placitum 26 must be confined.

It would thus appear, that in the passage under consideration, what Nilakantha intends to lay down is that as regards property which does not class as woman's property in the technical sense, the "sons and the rest" take precedence over "the daughters and the rest." The question, however, remains as to who are the other heirs to such property, failing both sons and daughters. On Mr. Justice WEST'S construction, no doubt, as well as on Mr. Mayno's, no such question would arise, as the whole of the series of heirs defined elsewhere are thereby held to be the series of heirs to a deceased woman. But on the construction now put forward, it seems to us the answer to the question above formulated must be that the heirs to *stridhan* proper and *stridhan* improper are identical, save that as between male and female offspring the latter have a preferential right as regards *stridhan* proper, while the former have a similar right as to *stridhan* improper. It must be admitted, no doubt, that there is some little difficulty created in the way of the adoption of this view, by the circumstance that the Vyavahara Mayukha in dealing with the later stages of the devolution only mentions *stridhan* proper, whereas on this view one would expect that he should there mention both classes of *stridhan*. This is true, but we think the difficulty is not insurmountable in the case of a work constructed as the Mayukha is, when it is remembered that the author's aim throughout is to evolve his propositions from the texts of older writers. In this particular case, for instance, while it is true that in placitum 27 the rule laid down relates in terms only to *stridhan* proper, though on the view here expressed it is really intended to apply to both classes of *stridhan*, still that circumstance may be said to be to some extent explained by this, that that placitum is only a reproduction of a text of Yajñavalkya with a short introductory comment of Nilakantha's, and no more. As Nilakantha understood that text only to refer to *stridhan* proper, he could only use it as an authority for a proposition [769] limited to that class. And if he does not go on at the same time to point out that that proposition should also be applied to *stridhan* improper, this is probably because he must have supposed that as he was laying down no other rule about it, this general rule must be treated as applicable; and further because he probably thought that he had to all intents and purposes already indicated that the difference between the lines of inheritance to the two classes of *stridhan* was limited to the one point already mentioned by him in that connection. Independently of these considerations we think that as we have here to find out a rule for the devolution of one class of *stridhan*, where no express rule is stated in distinct terms, it is more likely that the author intended it to be found in the rule laid down as regards another species of the same genus of property, especially as all the species of that genus are dealt with in one and the same section, than that he intended to refer us for guidance to a rule laid down as regards an entirely different kind of property, the succession to which is laid down in an entirely different section of the work, and laid down in a manner which, without modification, is admittedly not applicable to the species of property here under consideration. If the latter rule was intended by Nilakantha to be applied in this case, we think we might fairly expect that to be stated much more explicitly than it has been in fact in the passage under discussion.

On general grounds, too, we think it may be said that the rule, as now stated, is in harmony with the doctrines of the Mayukha. The author of that work, like the author of the Mitakshara, declines to look upon the enumerations of specific kinds of *stridhan* in the old Smriti texts as exhaustive. He includes under the name all that under the law becomes the property of the woman*; only, unlike the author of the Mitakshara, he distinguishes the specific kinds enumerated in the texts from those which are not so enumerated, for purposes of inheritance†. In doing this, it seems quite reasonable to lay down that as regards that class of property which is emphatically woman's [770] property, being expressly so named by the old sages, the female offspring should take precedence over the male: while as regards that which is not such, the general preference given to the male offspring over female by Hindu law should have effect. On the other hand, there is no obvious reason, why in the case of collateral relations any similar distinction should be maintained between the two classes. Of course, if the woman whose property is in question is not to be treated as a fresh source of devolution at all—which is Mr. Mayno's view as regards *stridhan* improper—all these considerations are beside the question.

But, apart from the points already discussed, we confess it seems to us that once we recognise the woman's ownership in the property in the way it is recognised by Nilakantha, it is a matter of course recognising her as a fresh source of devolution, unless some powerful considerations can be urged on the other side. We can see none such here, but rather the contrary. For it must be remembered that the property with which the rule in question deals is not merely that which the woman obtains by inheritance, but may include that which is never belonged to her husband or any other relation either on the husband's or the father's side, but is her own original acquisition, Ch. IV, sec. 10, pl. 3—12; Stokes, pp. 99—102. Such property is the woman's property; it is not the husband's property. Why, then, should it go on her death to any one except to those who are the woman's heirs? And how can the rule about the last male owner be made applicable to such property at all?

On these grounds we are of opinion that the daughters of the deceased Bai Rewa are her legal representatives for the purposes of this appeal, and that, therefore, the order of the Court below should be reversed and the appeal remanded for disposal by the lower Court. Costs to abide the result.

Order reversed

NOTES.

[1. For non-technical *stridhan* also, the descent has to be traced from the woman:—(1896) 5 M.L.T., 169; (1907) 31 Bom., 453 (daughter's estate in Bombay); (1909) 5 Bom. L.R., 211; (1909) 34 Bom., 385 (males preferred); (1896) 21 Bom., 739; (1895) 19 Mad., 110 at 119; (1905) 25 All., 168. See also (1911) 14 Bom. L.R. 80; (1912) 20 I.C., 557 (Nagpur); (1909) 6 N.L.R., 3; (1908) 4 N.L.R., 31; (1905) 2 S.L.R., 59.

2. The Privy Council in (1903) 25 All., 468 adverted to the difference between the Mayukha and the Mitakshara as regards succession to property inherited by a woman whether from a male or a female.]

* Ch. IV, sec. 10, pl. 2. See Stokes, Hindu Law Books, p. 98.

† Stokes, p. 104 (pl. 24); and Stokes, p. 105 (pl. 26), where a word in the original is omitted in the translation; see Mandlik's Mayukha, p. 97.

[771] APPELLATE CIVIL.

The 19th October, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Govind Venkaji Kulkarni.....(Original Plaintiff) Appellant

versus

Sadashiv Bharna Shet and another..... (Original Defendants) Respondents

Encroachment on land—Injunction—Damages—Legal rights of owner of land—Owner not compellable to accept compensation instead of removal of encroachment.

In a suit to recover land adjacent to a temple belonging to the defendants, on which land the defendants had encroached by building verandahs, the lower Courts found that the land sued for was the property of the plaintiff subject to the defendants' right of access to the temple, and directed the defendants to pay compensation to the plaintiff for the encroachment. The plaintiff appealed to the High Court.

Held, that the land being found to be the plaintiff's, the Courts could not compel him to part with his legal rights and accept compensation against his will, however reasonable it might appear to be. The defendants were accordingly ordered to remove the verandahs complained of.

THIS was a second appeal from the decision of Dr. A. D. Pollen, District Judge of Belgaum.

The plaintiff sued to establish his title to and recover possession of certain portions of land adjacent to a temple on which land the defendants had encroached by building verandahs; the temple belonging to the defendants, and the land all around it belonging to the plaintiff.

The defendants denied plaintiff's title and pleaded limitation.

The Subordinate Judge found that the land in dispute belonged to the plaintiff, and directed the defendants to pay compensation to the plaintiff for their encroachment.

Plaintiff appealed, and the District Judge having found that the ground round the temple belonged to the plaintiff, subject to defendants' right of access to and of using the temple, passed a decree in the following terms:—

"I vary the decree by finding that plaintiff is the owner of the land in dispute on the north and east sides of the temple as claimed in the plaint, and by awarding his costs throughout. I otherwise confirm the decree."

[772] The plaintiff preferred a second appeal.

Balaji Abaji Bhagvat, for the Appellant.

P. M. Mehta (with B. N. Bhajekar), for the Respondents.

Sargent, C. J.:—Both the Courts below have found that the land in question belongs to the plaintiff; but subject, as the Court of appeal has found, to a right of access to the temple. Such being the findings as to the property in the land, the Courts could not compel the plaintiff to part with his legal rights and accept compensation against his will, however reasonable it might appear to be.

We must, therefore, reverse the decree of the Court below, except as to the order as to costs, and order the defendants to remove the verandahs complained of by the plaintiff. Defendants to pay plaintiff his costs of this appeal.

Decree reversed.

N.B.—After the High Court's judgment was delivered, the plaintiff presented a petition of review praying for a direction in the decree for delivery of possession. The Court, thereupon, on the 20th April 1893, amended the decree by adding "and to restore possession of the land to plaintiff" after the words "remove the verandahs complained of by the plaintiff."

NOTES.

[See also (1904) 28 Bom., 293.]

[17 Bom. 772]

APPELLATE CIVIL.

The 19th October, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR JUSTICE CANDY.

Irangowda.....(Original Defendant) Appellant

versus

Seshapa.....(Original Plaintiff) Respondent.*

Practice—Procedure—Suit by decree-holder to declare a house subject to attachment in execution as being the property of the judgment debtor—Decree for plaintiff on ground that judgment debtor, though not the owner of the house, had an attachable interest in it as permanent tenant—Court cannot make out a new case for plaintiff

The plaintiff's case being that a certain house was the absolute property of his judgment-debtor, and that, therefore, he (the plaintiff) was entitled to attach it in execution of his decree, the Subordinate Judge found that the judgment-debtor was not the owner of the house, and rejected the plaintiff's claim. The Appellate Court held that (though the judgment-debtor was not the owner) he had an attachable interest in the house as permanent tenant, and allowed the plaintiff's claim. On appeal to the High Court by the defendant.

[773] *Held*, that the order of the Appellate Court made out an entirely new case for the plaintiff which he had not made himself at any period of the trial, and that the decree of the Lower Appellate Court should be reversed.

SECOND APPEAL from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge, with appellate powers, of Dharwar:

Suit to set aside an order removing attachment.

The plaintiff alleged that he had obtained a decree against one Sanganbasapa and in execution thereof attached the house in dispute as the property of Sanganbasapa. The defendant, thereupon, presented an application for the removal of the attachment on the ground that the house belonged to him and not to Sanganbasapa and got an order for the removal of the attachment. The plaintiff then brought the present suit to set aside that order and for a declaration that the house was liable to be attached and sold as the property of Sanganbasapa in execution of the plaintiff's decree against him.

The defendant alleged that the house was his ancestral property and Sangانبasappa his tenant; it was, therefore, not liable to be attached and sold for Sangانبasappa's debt.

The Subordinate Judge found that the house was not the property of Sangانبasappa, and that, therefore, it was not liable to be sold in execution of the plaintiff's decree.

On appeal by the plaintiff that Sangانبasappa was the owner as admittedly he was in possession, the Subordinate Judge with appellate powers found that the house belonged to the defendant, who had reserved to himself a right to rent only, that Sangانبasappa was permanent tenant, and that permanent tenancy was "such a title as the plaintiff must be permitted to attach and sell." He, therefore, reversed the decree of the Subordinate Judge making the declaration sought for by the plaintiff.

The defendant preferred a second appeal.

Narayan Ganesh Chandavarkar, for the Appellant (Defendant):—The plaintiff did not allege in his plaint that his judgment-debtor had a right to live in the house as a permanent tenant, and that that right should be sold in execution of the decree. His case was that his judgment-debtor was absolute owner of the [774] property, and that the right of absolute ownership should be sold. The first Court rightly rejected the claim. The Lower Appellate Court was wrong in making out for the plaintiff a case which was never alleged by him and with respect to which no issue was asked for in the first Court. The lower Court could not dispose of the case on a ground not raised in the plaint, in the issues or the pleadings.

Vishnu Krishna Bhatavdekar, for the Plaintiff.

Sargent, C. J.:—The plaintiff's case as made by his plaint was that he was entitled to attach the house as the absolute property of Sangانبasappa. The first issue was framed by the Subordinate Judge on that assumption, and the fourth ground of objection in plaintiff's own appeal to the Court below was that the first Court was wrong in not holding that Sangانبasappa was the owner of the house. The case has, therefore, been tried exclusively on the basis of determining whether Sangانبasappa was the owner of the house. However, the lower Court of appeal has found that, although defendant is the owner, Sangانبasappa had an attachable interest in it as a permanent tenant; but this is to make an entirely new case for the plaintiff, which he never made himself at any period of the trial.

We must, therefore, reverse the decree of the Court below and restore that of the first Court, with costs on plaintiff here and in the Court below.

Decree reversed.

THE INDIAN LAW REPORTS, BOMBAY SERIES,
CONTAINING CASES DETERMINED BY THE HIGH
COURT AT BOMBAY AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL
FROM THAT COURT.

BOMBAY—Vol. XVIII-1894.

ORIGINAL CIVIL.

The 18th April, 1893.

PRESENT :

MR. JUSTICE STARLING.

Byramji Jehangir Lamana and others.....Plaintiffs
versus.

Ratnagar Jamsotji Ratnagar and others.....Defendants.*

*Will—Construction—Gift of income for life with power to appoint—Power
of appointment—Invalid power of appointment—Gift over in default
of appointment—Gift of residue equally between two sons and
then to next of kin—Construction.*

A Parsi by his will devised a certain house to his executors on trust after payment of repairs, &c., out of the income thereof to pay the balance of such income to his daughters Cuverbai and Jerbai in equal moieties and after their death "to the use of such of the issues only of the said Cuverbai and Jerbai as they should respectively appoint, such appointment to affect their own respective moiety only and not that of the other of them," and in default of appointment on trust to sell the house and divide the proceeds as directed in the will.

Held, that each daughter took half the house in question for her life with power to appoint it among her children as she thought fit. Even if the power to appoint had been invalid, the gift over on default should be upheld on the authority of *Peacock v. Frigout*, L. R. (1893), 1 Ch., 51.

A Parsi testator by his will bequeathed the residue of his moveable property to his executors in trust out of the income thereof to apply the sum of Rs. 50 for the maintenance of his son Ratnagar until he should attain 21 years of age and to invest the surplus of such income in Government securities, which should be added to the original *corpus* of his moveable property for the benefit of his said son Ratnagar, and upon his attaining the age of 21 to pay over to him "the whole of the interest, dividends and produce only of the *corpus* of the whole of the moveable property," and after the death of Ratnagar in trust to divide the said *corpus* of the moveable property with all its additions and accumulations among the next of kin

of the said Ratnagar. By a codicil subsequently executed the testator directed that the above bequest should extend and be applicable to his son Nusserwanji and that the executors should divide the income of the moveable property between [2] Ratnagar and Nusserwanji instead of giving the whole to Ratnagar. The Court was of opinion that under the will and codicil Ratnagar and Nusserwanji were each to have a moiety of the income for their respective lives, and that on their death one moiety of the *corpus* was to go to their next of kin. The Court, however, declined to make a declaration to that effect, as Ratnagar, who at the date of suit was unmarried, might afterwards marry and have children, who would not be bound by a declaration made in this suit.

SUIT by executors for the construction of a will.

Jamsetji Ratnagar, a Parsi, died at Bombay on the 21st May 1877. He left a will, dated the 31st January 1874, and two codicils, dated, respectively, the 25th March 1875, and the 20th May 1877; and his executors, the plaintiffs, duly obtained probate on the 19th September 1877.

The first plaintiff was the son-in-law, and the second plaintiff (Nusserwanji Jamsetji Ratnagar) was the eldest son of the testator.

The will, after appointing executors and making certain bequests, contained a clause whereby the testator devised to the executors a certain house situated at Breach Candy on trust, out of the income thereof to keep it in repair, &c., and after such payments—

“to pay and divide the net rent of the said house to and amongst my daughters, Cuverbai, wife of the said Byramji Jehangir Lamna, and Jerbai not yet married during the term of their respective natural life as tenants in common for their sole use and benefit on their own respective receipts only, free from the control, debts and marital rights of their respective husbands, and after the death of the said Cuverbai and Jorbai to the use of such of the issues only of the said Cuverbai and Jerbai respectively and for such estate and estates, uses, ends, intents and purposes of such issues only as they, the said Cuverbai and Jerbai, notwithstanding their or her coverture and whether they or she shall be sole or covert shall respectively from time to time by any deed or deeds, instrument or instruments, in writing, with or without power of revocation to be by them respectively sealed and delivered in the presence of and attested by two or more credible witnesses or by their respective last will and testament, in writing, direct, limit or appoint—such direction, limitation or appointment to affect their own respective moiety or share only, and not that of the other of them, and in default of such direction, limitation or appointment upon trust to sell or dispose of the said house and to pay and divide the proceeds thereof equally to and among their respective lawful issue *per stirpes* and not *per capita* according to the law then in force relating to intestate succession among the Parsis, &c.”

As to the residue of his estate the testator directed as follows:—

“And I give and bequeath all my Government promissory notes or loans of the Government of India, Bombay municipal debentures, post bills, or drafts of the local or any other banks, money deposited in any such banks on current or fixed deposit [3] account, money lent on the mortgage or security of immoveable properties, ready cash, and all the rest residue and remainder of my personal and moveable estate whatsoever and wheresoever of which I may be possessed at the time of my decease and not otherwise disposed of by this my will, unto the said Hormusji Dadabhoy Parnik, Dosabhoy Dadabhoy Parnik, Byramji Jehangir Lamna and Nusserwanji Jamsetji Ratnagar or the survivor of them and the executors, administrators of such survivors, upon the trusts and for the intents and purposes, hereinafter expressed and declared, of and concerning the same,—that is to say, upon trust to deposit all such Government promissory notes, municipal debentures, post bills, drafts, ready cash, &c., in the New Bank of Bombay, Limited, or any other bank constituted under the Royal charter or formed and registered under the Indian Companies Act for safe custody and to pay and apply out of the interest dividends produce or income of such moveable estate the sum of Rs. 1000—

the maintenance and education or otherwise for the benefit of my son, Ratnagar Jamsetji, until he shall attain the age of 21 years, and in the meantime to accumulate and invest the surplus of such interest, dividend and produce in the promissory notes of the Government of India or such other securities as may have been guaranteed by such Government, such investment to be made through or by the hands of the banks aforesaid in which the said moveable property may have been deposited at that time for safe custody as heretofore directed and to be added to the original or *corpus* of the said moveable property for the benefit of my said son, Ratnagar Jamsetji, and on his attaining the age of 21 years to pay over to him the whole of the interest, dividends and produce only of the *corpus* of the whole of the moveable property as well as the interest, dividend, and produce of all the accumulations and additions which may have been made to the original or *corpus* of the said moveable property in the manner aforesaid or howsoever otherwise made or which may be then due and accrued thereon, and upon and after the death of my said son, Ratnagar Jamsetji, upon trust to deliver over, pay and divide the original *corpus* of the said moveable property with all its accumulations, additions and further interest, dividends and produce accrued and due thereon to and among all the lawful issues of the said Ratnagar Jamsetji according to the statute or law then in force in Bombay relating to intestate succession among the Parsis, but if there be only one issue then to such one issue only, but in the event of the death of the said Ratnagar Jamsetji without any lawful issue then upon trust to give, deliver over, pay and divide the whole of the said moveable property with all its accumulations and additions, &c., to the rightful heirs of my body, share and share alike."

The second codicil, dated the 20th May 1877, after reciting this last mentioned clause of the will, continued:—

"Now I hereby declare and direct that the bequest, which I have made as aforesaid of the whole of my moveable property to the executors and trustees of my said will upon the several trusts and declarations therein made on behalf and for the benefit of my said son, Ratnagar Jamsetji, shall extend to and be applicable and be also for the benefit of my said son, Nusserwanji Jamsetji Ratnagar,—that is to say, that the executors and trustees of my said will shall pay and divide in equal shares and proportions the whole of the income of all my moveable property to and amongst my said sons, the said Ratnagar Jamsetji Ratnagar and Nusserwanji Jamsetji Ratnagar, in lieu of paying the same over to the said Ratnagar Jamsetji only, and that the payment of the moiety of such income and produce to the said Nusserwanji Jamsetji Ratnagar shall be in addition to what I have already by my said will and first codicil given and bequeathed to him."

The suit now came on as a short cause. The questions submitted to the Court were the following:—

(1) Whether the power of appointment conferred by the said will and codicils on the defendants Curverbai and Jerbai of the rents of the house No. 692, Braach Candy, in favour of their issues respectively and the limitation, in default of exercise of such power, of the said house in favour of the said issues are respectively valid and effectual, and if so, what is the true construction and legal effect of the same?

(2) What is the true construction and legal effect of the dispositions contained in the said will and codicils of the testator's moveable property, and in particular whether the minor defendants Moherbai Nusserwanji Ratnagar, Aimai Nusserwanji Ratnagar, Jamshedji Nusserwanji Ratnagar, Shapurji Nusserwanji Ratnagar, Banubai Nusserwanji Ratnagar, Buchubai Nusserwanji Ratnagar and Kharsedbai Nusserwanji Ratnagar take any and what benefit under and by virtue of such disposition?

The above-mentioned minors were the children of Nusserwanji Jamsetji Ratnagar, the testator's eldest son.

Macpherson, Rankes and Lowndes appeared for the various parties.

They referred to the Indian Succession Act (X of 1865) Secs. 100* and 103†; and *In re Abbott; Peacock v. Frigout*, L. R. (1893), 1 Ch., 54.

Starling, J.—This is a suit brought for the purpose of obtaining from the Court a declaration of the meaning and effect of two portions of the will and codicil of one Jamsetji Ratnagar who died on the 21st May 1877. This will and the codicils thereof appear to have been drawn by some person who had an extensive acquaintance with legal phraseology, but a very limited one with the way in which it ought to be employed.

The first question arises on the bequest of a house at Breach Candy to his executors and trustees upon certain trusts. The [6] words of the will are as follows:—(His Lordship read the clause of the will above set-forth, *ante* p. 2, and continued:—)

In those provisions there is, in the first instance, a devise of the whole estate of the testator in the said house to his executors and trustees upon certain trusts, *viz.*, out of the income thereof to keep the same in repair and to effect insurance thereon and to pay the net balance of the income to his daughters Cuverbai and Jerbai in equal moieties and after their death "to the use of such of their issues as they should appoint," *i.e.* the whole house is devised to the executors and trustees to the use of some one else upon the death of Cuverbai and Jerbai. Now it seems to me that this is practically equivalent to a devise to the trustees upon trust to pay the net income to Cuverbai and Jerbai for life, and on their death to stand possessed of the *corpus* for the benefit of some one else. The only difference the employment of the words "to the use of" would make would be that probably those words would be held to vest the *corpus* at the appointed time in the beneficiaries without any conveyance from the trustees. Then, the provision that the beneficiaries shall be "such of the issues only of the said Cuverbai and Jerbai and for such estate, &c., as Cuverbai and Jerbai by deed or will shall appoint," seems to me to create a good and valid power of appointment, and I do not understand that counsel have suggested that so far it is not valid. The difficulty seems to have arisen on the next clause:—"Such direction, limitation or appointment to affect their own respective moiety or share only, and not that of the other of them." It has been argued that this clause renders the power of appointment invalid, on the ground that as Cuverbai and Jerbai only had a life-interest, neither of them had a moiety or share in the *corpus*, and that consequently the only power of appointment, in view of their death, was a power to appoint an interest which ceased at their death, and, therefore, was a power of appointing nothing. In my opinion, this is far too technical way of reading and interpreting this provision. Among ordinary laymen these two ladies would be looked upon as each having the usufruct of half the house, and thus, in ordinary though somewhat [6] unprecise language, it might be said that half the house belonged to each of them; and this is what I think the testator intended, and that the limitation of the power of appointment should be read as if it were provided that the said Cuverbai and Jerbai should respectively be entitled to appoint one moiety only of such house and no more. I consequently hold that the power of appointment is valid, and

Bequest to a person not in existence at the testator's death, subject to a prior bequest.

* [Sec. 100.—Where a bequest is made to a person not in existence at the time of the testator's death, subject to prior bequest contained in the Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.]

Bequest to take effect on failure of bequest void under section 100, 101 or 102.

† [Sec. 103.—Where a bequest is void by reason of any of the rules contained in the three last preceding sections, any bequest contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void.]

that Cuvembai and Jerbai are each of them* entitled to appoint by deed or will one moiety of the *corpus* of the trust property among their respective children in such way as she may think fit according to the provisions of the will. If I had come to the conclusion that this power was invalid, I should nevertheless uphold the gift over on failure of the exercise of the power. I need not do more than say that I fully agree with and follow the decision on this point of STARLING, J., in *Peacock v. Frigout*, L. R., (1893)* 1 Ch., 51.

The next point is a much more complicated one and arises on the bequest by the will of the residue for the benefit of the testator's son Ratnagar, and a direction in the second codicil directing that Nusserwanji shall share equally in that bequest. The direction of the will is as follows:—(His Lordship read the clause of the will above set forth, *ante*, p. 2, and continued:—)

Then in the second codicil the testator recites fully the provision that he has made for Ratnagar, and proceeds:—(His Lordship read the codicil as above *ante*, p. 3, and continued:—)

This, to my mind, clearly amounts to a devise of the income of the residue to Ratnagar and Nusserwanji in equal moieties for their respective lives; but no provision is expressly made in this codicil as to what is to happen to a moiety of the *corpus* on the death of Nusserwanji, whereas there is in the will full provision made for the application of the *corpus* after the death of Ratnagar. Taking everything into consideration, however, I am of opinion that what the testator meant by the will and codicil was that Ratnagar and Nusserwanji were each to have a moiety of the income for their respective lives, and that on their respective deaths one moiety of the *corpus* was to go to their next-of-kin under the Parsi Succession Act (XXI of 1865). I do not, however, think I can make a declaration to that effect. Ratnagar has no children at present, but he is a young man and may marry and have children, and the effect of such a declaration would be to limit the right of such children to half the *corpus* of the residue: consequently, as they cannot be represented in this suit, they would not be bound by any declaration I might make affecting their interests, and I must refrain from doing more than express any opinion on the point.

Attorneys for all parties:—Mr. Darasha Bazonji.

[18 Bom. 7]
ORIGINAL CIVIL.

The 15th August, 1893.

PRESENT :
MR. JUSTICE STARLING.

Tribhuvandas Ruttonji Mody and another.....Plaintiffs

versus

Gangadas Tricumji and another.....Defendants.

Will—Construction—Gift to a class—One member of such class in existence at date of gift—Will directing deed to be executed—Date of deed is date of gift.

One Ruttonji Rupji Mody died in 1856 leaving a will whereby he directed his widow and executrix Ladcure to purchase an estate worth Rs. 20,000 for his grandson Tricumji, and that this estate should be conveyed to trustees, to be held by them in trust for Tricumji for his life or until his insolvency, and after his death for his son or other male heir. At the time

* Suit, No. 190 of 1893.

of the testator's death Tricumji had no son. The executrix purchased the estate, but no trust-deed was executed. Tricumji, therefore, brought a suit in 1871 to have the will carried out and a trust deed executed. Tribhuvandas Ruttonji (the plaintiff herein), who was Tricumji's uncle, was made a party to that suit and a consent decree was passed which ordered that the executrix Ladcore and Tribhuvandas should execute a trust-deed in accordance with the directions in the will. A deed was accordingly executed in 1876 whereby the property was conveyed to trustees on the trusts declared in the will. At the time of the testator's death Tricumji had no son, but at the date of the deed in 1876 he had one son Chunilal; and in 1883 another son Gangadas (the defendant) was born to him. Tricumji died in 1890. Chunilal died childless in 1891. The plaintiffs, who were the son and grandson of the testator, now claimed the property. They contended that as neither of Tricumji's sons were in existence at the date of the testator's death they could not take under his will or under the deed which was afterwards executed to carry out the will; that although at the date of the deed in 1876 one of the sons (Chunilal) was in existence, nevertheless he could only claim as one of a class, and that class was not ascertained or ascertainable at the date of the testator's death, nor at the date of the deed, Gangadas not having been born until 1883. The whole class was, therefore, excluded, and the property after Tricumji's death was undisposed of.

[8] *Held*, that, in view of the direction of the will that a deed was to be executed which should declare the trusts of the property, it was the date of the deed subsequently executed which should be regarded in order to determine the validity of the limitation of the property bequeathed, and not the date of the testator's death, and that under the deed on the death of Tricumji his son Chunilal became entitled to the property.

In the case of a gift to a class, if there is a person in existence at the time of the gift capable of taking and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor meant the gift also to benefit, but who cannot take because of their non-existence at the date of the gift.

THE first plaintiff was father of the second plaintiff and the first defendant was the grandson of the first plaintiff's brother. The plaintiffs sued to recover from the defendants certain property situated in Bombay.

One Ruttonji Rupji Mody had two sons, viz., Tribhuvandas Ruttonji (the first plaintiff) and Premji Ruttonji. The latter died in his father's life-time and left a son named Tricumji Premji. Tricumji died in 1890, leaving two sons, Gangadas (the first defendant) and Chunilal, who died in 1891, leaving his widow Kasturbai, the second defendant, him surviving.

Ruttonji Rupji Mody had died long previously, viz., in 1856. He left a will, dated the 10th June 1856, whereby he demised the residue of his property to his son Tribhuvandas (the first plaintiff) and to his (testator's) widow Ladcore, and appointed the latter to be his executrix. By this will he directed that an estate of the value of Rs. 20,000 should be purchased for his grandson Tricumji Premji, and that it should be conveyed to trustees to be held by them in trust for Tricumji-Premji during his life or till his insolvency, and after his death for his sons or male heirs.

The words of the will were as follows:—

"Landed estate of the value of Rs. 20,000 shall be purchased in Bombay. Bhai Tricumji shall receive the rents thereof, and in the deed thereof it should be provided that it shall not be claimable by any of Bhai Tricumji's creditors. A deed of such tenor shall be caused to be made and delivered . . . The above-mentioned property shall be given to Bhai Tricumji. And, in the event of Bhai Tricumji departing this life, Bhai Tricumji's son, who may be the *waist chain*, i.e., succeed his father as male heir and representative, is to enjoy the property, and should he have no son the whole shall belong to Bhai Tribhuvan."

[9] In pursuance of the direction of the will, Ladcore purchased the estate, but no trust-deed was executed. Tricumji Premji accordingly brought a suit (No. 817 of 1871) against her, in which he prayed that Ruttonji's will should be carried out and a trust-deed executed, and for an account, &c. The first plaintiff Tribhuvandas was made a party to that suit, which was finally settled by agreement between the parties, and a consent decree was taken, one of the terms of which ordered that Ladcore and the first-plaintiff Tribhuvandas should execute a trust-deed in accordance with the directions contained in the will.

In pursuance of this decree a trust-deed was executed on 21st June 1876, by Ladcore and the plaintiff Tribhuvandas, and by this deed the property now in dispute (*inter alia*) was conveyed to trustees, and due provision made for carrying out the intentions of the testator.

At the date of Ruttonji's death, in 1856, Tricumji Premji had no children, but in 1867 his son Chunilal was born, and in 1883 another son Gangadas (the first defendant) was born. Tricumji died in April 1890, and Chunilal, as above stated, died in May 1891, leaving his widow Kasturbai (defendant No. 2) him surviving. Ladcore died in 1879.

In the present suit the plaintiffs contended that on Tricumji's death the property which had been purchased as directed by the will was undisposed of and became part of the testator's estate to which they were entitled; that as Tricumji's sons were not born at the date of the testator's death they could not take either under the will or under the deed which was afterwards executed to carry out the will; that although at the date of the deed (1876) one of the sons (Chunilal) was in existence, nevertheless his claim was only as one of a class which was not finally ascertained or ascertainable at the testator's death or even at the date of the deed, Gangadas not having been born until 1883. The whole class was, therefore, excluded, and the property after Tricumji's life-interest was undisposed of. The plaintiffs further contended that the whole of the testator's property was ancestral, and that the will was, therefore, inoperative.

In their written statement the defendants denied that the property of Ruttonji Rupji was ancestral, and they contended [10] that he had full power to dispose of it by will. They further alleged that the first plaintiff had acquiesced in, and acted upon, the said will, and had recognised it as valid, and they contended that he was now estopped from disputing it.

They further pleaded that the consent decree in Suit No. 817 of 1871 was a good and valid compromise of the disputes between the parties thereto and did not depend on the validity or invalidity of the will; that the deed of 1876 carried out the terms of the compromise, and that the plaintiffs were barred by it; that, apart from the compromise, the bequest in Ruttonji's will was valid, and enured for the benefit of Tricumji Premji for life, and after his death for his son Chunilal Tricumji; that Chunilal and his brother Gangadas (defendant No. 1) lived together as a joint family, and that on Chunilal's death the property survived to Gangadas (defendant No. 1).

At the hearing, a number of issues were framed with reference to the will and the effect of the consent decree, but in the first instance only the following two were disposed of, *viz.*—

Whether, in the events that had happened, the property comprised in the trust-deed of the 21st June 1876, had not reverted to the estate of Ruttonji Rupji? and

Whether the first plaintiff was not estopped from disputing the title of Chunilal Tricumji to the said property?

Lang (Acting Advocate-General) and *Inverarity* for Plaintiffs.

Macpherson and *Scott* for the Defendants.

The following authorities were referred to:—The *Tagore case*, 9 Beng. L. R., 377, at p. 394; *Mangaldas v. Tribhuvandas*, I. L. R., 15 Bom., 652; *Kam Lal Sett v. Kanar Lal Sett*, I.L.R., 12 Cal., 663; *Manjamma v. Padmanabhayya*, I. L. R., 12 Mad., 393; Mayne's Hindu Law (5th Ed.), paragraph 354.

Starling, J.—In this case one Ruttonji Rupji, who died in 1856, made a will of which he appointed one Ladcore executrix. By that will he (*inter alia*) directed as follows:—"Landed estate of the value of Rs. 20,000 shall be purchased in Bombay. Bhai Tricumji shall receive the rents thereof, and in the deed [11] thereof it should be provided that it shall not be claimable by any of Bhai Tricumji's creditors. A deed of such tenor shall be caused to be made and delivered." Then, after enumerating certain other property, the will continues:—"As thus described the above-mentioned property shall be given to Bhai Tricumji, and, in the event of Bhai Tricumji departing this life, then Bhai Tricumji's son, who may be the *waist chain*, is to enjoy it, and should he have no son, the whole shall belong to Bhai Tribhuvan."

Ladcore purchased the property, but did not execute any deed, in reference thereto, as directed by the will, nor did she allow Tricumji to receive the rents thereof. Consequently Tricumji filed Suit No 817 of 1871 against Ladcore, praying (*inter alia*) that she should be ordered to execute a deed in terms of the said will, conveying the property to trustees. Subsequently the first plaintiff was added as a party-defendant, and afterwards on the 16th July 1874, a consent decree was passed whereby Ladcore and the first plaintiff were ordered to execute a deed in terms of the will.

On the 21st day of June 1876, a deed was executed by Ladcore and the first plaintiff by which the said property was conveyed to trustees on certain trusts. The trusts are in more detailed terms than appear in the will, but it is admitted that they are proper for the due carrying out of the intention of the testator.

At the date of the testator's death, Tricumji had no children. A son, named Chunilal, was born to him in 1867, and he died in 1891, leaving him surviving his widow, Kusturbai, the second defendant. Another son was born to Tricumji in 1883, the first defendant Gangadas. Tricumji died in 1890.

To what date, then, are we to look in ascertaining the validity or otherwise of the limitations attaching to his property? The will of the testator does not directly devise the property to Tricumji upon certain limitations, but directs the executrix to buy property and to make a deed in respect thereof, in which it is to be provided that the property is to be held on the terms therein expressed. I am aware that in the will it is provided that Tricumji shall enjoy the rents of the property, and that on his death it should go to his son, but it is quite evident that the tes-[12]tator intended a deed to be made in respect of the house, and I must hold that the meaning of the words is "I direct my executrix to purchase a property worth Rs. 20,000, and convey the same to trustees, to hold the same upon the trusts in the will set forth." Consequently, as the testator intended the trusts to be set out in a deed, I am of opinion that it is to the date of the deed that we must look for the purposes of determining the validity of the limitations, and not to the date of the testator's death. The decree in Suit No. 817 of 1871 has no effect upon this matter, as it does nothing more than direct Ladcore to carry out the terms of the will, and does not, in my opinion, otherwise determine the right of the parties.

At the date of the deed, Tricumji had a son Chunilal, and he consequently was capable of taking advantage of the gift of the property to him on the death of his father, and would undoubtedly be entitled to it, unless the gift to him is made bad by the subsequent birth of the first defendant. The deed provides that on the death of Tricumji the property is to go to his son, if only one, and

to be divided among his sons, if more than one. As Chunilal was alive at the date of the deed, I must assume that it was intended that he should be benefited, although there might also be an intention that others should be benefited. Must I, therefore, hold that a limitation which was good at the date of the deed became bad by reason of others of the same class having subsequently come into existence, who could not take under the limitation? In my opinion, the cases of *Rai Bishen Chand v. Mussumut Asmaida Koer*, L. R., 11 Ind. Ap., 164; *Ram Lal Sett v. Kanai Lal Sett*, I. L. R., 12 Cal., 663; *Mangaldas v. Tribhuvandas*, I. L. R., 15 Bom., 652; *Manjamma v. Padmanabhayya*, I. L. R., 12 Mad., 393, show that, if there is a person in existence at the time of the gift capable of taking, and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor meant the gift also to benefit, but who cannot take because of their non-existence at the date of the gift.

Therefore, I am of opinion that under the deed, on the death of Tricumji, his son Chunilal became entitled to the property in [13] dispute; and as he died without issue, on his death the property descended to the first or the second defendant, but to which of them it is unnecessary, in the present suit, to determine.

So far this judgment has proceeded on the assumption that the property of Ruttonji Rupji was self-acquired, the determination of the question as to whether it was self-acquired or ancestral having been reserved until the determination of the foregoing points. If it was ancestral, although the first plaintiff may not have had power to dispose of the property in question in the way he did, I see no reason why the deed should be not binding upon both plaintiffs, so far as the life-interest of the first plaintiff in the income of the half of the property in dispute, which would have come to him on partition with the second plaintiff, is concerned.

For the reasons above given I find that, in the events which have happened, the property comprised in the trust-deed has not reverted to the estate of Ruttonji Rupji. I also find on the fifth issue that the first plaintiff is estopped from disputing the title of Chunilal to the said property. I record no finding at present on the other issues, as they would be affected by the determination of the question whether the property of Ruttonji Rupji was ancestral or self-acquired.

Attorneys for the Plaintiffs :—Messrs. *Edgelow and Gulabchand*.

Attorneys for the Defendants :—Messrs. *Bhaishankar and Kanga*.

NOTES

[A gift to a class is not invalid merely because it fails as regards some members of the class; and those can take who are otherwise qualified :—(1911) 15 C.W.N., 393 P.C., on appeal from (1905) 32 Cal., 992; see also (1895) 20 Bom., 571; (1897) 24 Bom., 533.]

[18 Bom. 13]

ORIGINAL CIVIL.

The 21st August, 1893.

PRESENT:

MR. JUSTICE STARLING.

Hormasji Manekji Dadachanji.....Plaintiff

versus

Keshav Purshotam and another.....Defendants.*

Registration—Indian Registration Act (III of 1877), Secs. 12 and 49—

*Decree—Attachment—Execution—Unregistered contract for sale
of land subsequently attached in execution.*

In execution of a decree against *S* and *P*, property was attached on the 11th February 1891, and sold by auction to the plaintiff in July 1892. The defendants, [14] however, alleged that at the date of attachment the property did not belong to *S* and *P*, as they had sold it to them (the defendants) on the 22nd January 1891, under a contract of sale of that date. Their contract had not been registered.

Held, that by clause (b) of section 17 of the Indian Registration Act (III of 1877) the contract needed registration if it was intended that it should affect the land (section 49). Not being registered it did not operate to transfer the ownership, and could not be received in evidence of any transaction affecting the land, *i.e.*, it could not be used to show that the ownership had passed from the vendor to the purchaser. The property in question was, therefore, at the date of attachment the property of *S* and *P*, and under the attachment and sale in execution it passed to the plaintiff.

A contract for the sale of immoveable property recited that on the date thereof, Rs. 100 had been received as earnest-money, and provided that within two months the vendor would execute a proper conveyance, and thereupon receive the balance of the purchase-money and give up possession.

Held, that the document did not pass any right, title or interest in the property to the purchaser, but merely gave him a right against the vendor personally to call for a conveyance and possession on paying the balance of the purchase money.

SUIT by a purchaser at an execution sale for partition and possession of the property purchased.

The plaintiff set forth that in execution of a decree in Suit No. 677 of 1890 passed against Shricrishna Janardan and Pandharinath Janardan on the 10th January 1891 their right, title and interest in a certain immoveable property consisting of a house and land in 1st Carpenter Street, Bombay, was sold by public auction on the 27th July 1892, and the present plaintiff Hormasji Manekji became the purchaser. The property had been attached on the 10th February 1891.

At the time of the sale, Shricrishna and Pandharinath were entitled to a third share of the said property, and were in exclusive possession of (*inter alia*) the first floor of the house. On the 15th September 1892, the plaintiff obtained a writ of possession, and in execution of it the defendants in this suit were removed from portions of the first floor into which they had entered in collusion with Shricrishna and Pandharinath, and the plaintiff obtained possession.

The defendants, thereupon, on the 20th September 1892, took out a rule calling on the plaintiff to show cause why they should [15] not be put back into possession of the said first floor, and an order was made requiring the

* Suit No. 621 of 1892.

plaintiff to establish his right to possession of the first floor of the house in question.

The plaintiff then filed this suit. He prayed for a declaration that he was entitled to a third of the said house and land, and to possession of the first floor thereof, and that the defendants were not entitled to possession of the said first floor. He also prayed for possession of his first floor, and, in the alternative, in case the defendants should be held to have any right to the first floor, for a partition, &c.

In the written statement the defendants said that they and one Janardan Purshotam (the father of Shricrishna and Pandharinath) were the sons of one Purshotam Sakham, to whom the property originally belonged. He died intestate, leaving these three sons him surviving. Janardan died in 1886, leaving two sons, the said Shricrishna and Pandharinath. They stated that the said property had never been divided between them and the said Janardan, but that by an agreement dated the 22nd January 1891, Shricrishna and Pandharinath had sold their right, title and interest in the property to them (the defendants), and that since that time they (the defendants) had been owners of the whole of the property, but that by permission Pandharinath had occupied a part of the said first floor for a time. They contended that the first floor had been wrongfully taken possession of by the plaintiff.

At the hearing the only issue raised was whether at the time of the attachment (10th February 1891) in Suit No. 677 of 1890 Shricrishna and Pandharinath had any and what right, title and interest in the said premises.

It was admitted that prior to the 22nd January 1891, they were entitled to a third share.

Macpherson and Scott for Plaintiff. They cited *Dart's Vendors and Purchasers*, p. 284; *Burjorji Cursetji v. Muncherji Kuverji*, I. L. R., 5 Bom., 143; *Tasker v. Small*, 3 Myl. & C., 63; *Fox v. Pursell*, 3 Sm. & G., 242.

[16] *Lang* (Acting Advocate-General) and *Anderson* for Defendants. They cited *Balaji Anant v. Ganesh Janardan*, I. L. R., 5 Bom., 499; *Dhondu v. Ramji*, 4 Bom. H. C. Rep., 114 (A.C.J.); *Krishnapa v. Panchapa*, 6 Bom. H. C. Rep., 258 (A.C.J.); *Naigur Timapa v. Bhaskar Parmaya*, I. L. R., 10 Bom., 444; *Johur Mull v. Tarankisto Deb*, I. L. R., 10 Cal., 252.

Starling, J.—In this case it is admitted that Shricrishna Janardan and Pandharinath Janardan were jointly entitled to an undivided third share of certain property in 1st Carpenter Street, Bombay, to the remaining two-thirds in which the defendants were entitled; and it is also admitted that these two persons continued to be entitled to their one-third, unless their interest therein was divested by an agreement for sale of the said interest which was executed by them on the 22nd January 1891.

On the 10th of January 1891, a decree was passed against Shricrishna and Pandharinath in Suit No. 677 of 1890. On the 10th February 1891, their interest in the property was attached in execution of that decree, and on the sale of that interest on the 27th July 1892, the plaintiff became the purchaser thereof, and the sale to him was duly confirmed. *Prima facie*, therefore, the plaintiff is entitled to a partition of the property, and, on such partition, to be allotted one-third thereof.

The defendants, however, say that at the time of the attachment Shricrishna and Pandharinath had no interest in the property, because on the 22nd January 1891, they had agreed to sell it to the defendants, and by such agreement all their interest had passed to the defendants.

There is no doubt that such an agreement was executed, though there are circumstances in the case from which it has been argued that it was never intended to operate at all, but was merely a contrivance to prevent the decree which had been passed, being executed.

If that is the true view of the facts, then I think the agreement might be treated as non-existent, and a decree passed for the plaintiff; but I do not think it necessary to decide this point, [17] and will treat this case as if a good and *bond fide* contract for sale had been made on the 22nd January 1891.

The question to be decided is, therefore, what in this country is the effect of an unregistered contract for sale on an attachment on the property comprised therein placed subsequent to the date of the agreement. In England it would seem that if immoveable property be agreed to be sold, and subsequently judgments are entered up against the vendor, which would under ordinary circumstances bind the land, that circumstance does not in any way prevent the vendor from being able to make a good title to the land; see *Lodge v. Lyseley* 4 Sim., 70. In England, however, there is no Registration Act, and this Act seems to me to make a great difference in the effect of a contract for sale of land in this country. In England a contract for sale of land in equity operates to transfer the ownership from the vendor to the purchaser. Under section 17 of the Indian Registration Act (III of 1877), clause (b), such an instrument must be registered, otherwise under section 49, it will not affect the land, *i. e.*, it will not operate to transfer the ownership; and it cannot be received in evidence of any transaction affecting the land, *i. e.*, it cannot be used to show that the ownership has passed from the vendor to the purchaser. Consequently I am of opinion that in this country it is not open to a purchaser under an unregistered contract of sale to allege that after the contract the vendor has lost his right, title and interest in the land itself.

The contract in this case which was admitted in evidence, under clause (h) of section 17 of the Registration Act, as being an instrument which did not create, &c., any right, title or interest in immoveable property, but merely created a right to obtain another document, which, when executed, would create such a right, recites that on the date thereof Rs. 100 had been received as earnest-money, and provides that within two months the vendors would execute a proper conveyance, and thereupon receive the balance of the purchase-money and give up possession of the property sold. This document, therefore, on the face of it, clearly falls within clause (h), and only gives the purchaser a right [18] against the vendor personally to call for a conveyance and possession on paying the balance of the purchase-money. Such a document might in England perhaps operate in equity to pass the land to the purchaser, but for the reasons already given I do not think that that is its legal effect in this country. Up to the date of the issue of the sale certificate to the plaintiff nothing was done to carry out this contract. In fact, after the attachment was placed on the property on the 1st February 1891, section 276 of the Civil Procedure Code (XIV of 1882) would have made any subsequent alienation void as against the attachment, and so, in any event, the defendants would have to rest their case upon the effect of the contract for sale. Consequently at the date of sale the defendants had nothing more than a right to call for a conveyance on payment of the balance of the purchase-money, and no right, title or interest in the land itself.

Under the circumstances I am of opinion that on the 10th February 1891 Shrikrishna and Pandharinath were the owners of their one-third share in the property, in dispute, and that their share therein was capable of attachment and sale, and that by the sale on the 27th July 1892, the ownership of that

one-third passed to the plaintiff, who is consequently entitled to a decree for partition against the defendants. If I had not come to this conclusion I am of opinion that under the prayer for further and other relief I could have given the plaintiff a decree for Rs. 1,900, the balance of the purchase-money unpaid at the date of attachment, together with interest thereon, as the defendants have been in possession ever since the agreement according to their own account, and doubtless under the circumstances of this case, this is the decree which would have been most beneficial to the plaintiff.

Attorneys for Plaintiff:—Messrs. Nanu and Normasji.

Attorney for Defendants:—Mr. Khanderao Moroji.

NOTES

[This decision was distinguished in (1900) 24 Bom., 400, on the ground of payment of purchase-money and delivery of possession and in (1903) 26 All., 266, on the ground of delivery of possession in satisfaction of a decree for dower.]

[19] APPELLATE CIVIL.

The 17th November, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Nagusha.....(Original Plaintiff) Appellant

versus

Municipality of Sholapur.....(Original Defendant) Respondent.

Municipality—Suit against Municipality for ejectment—The Bombay District Municipal Act Amendment Act (Bombay Act II of 1884), Sec. 48—The Bombay District Municipal Act (Bombay Act VI of 1873), Sec. 86.

The words “in the case of any such action for damages” in section 48† of the Bombay District Municipal Act Amendment Act (Bombay Act II of 1884) clearly show that it was contemplated that there might be actions of another description to which the provisions in the former paragraph would be applicable. The section does not contemplate only “suits to recover monetary compensation for a wrongful act.” A suit in ejectment—not being a suit brought to recover damages “for an act done or intended to be done”—was excluded under section 86‡ of the Bombay District Municipal Act (Bombay Act VI of 1873), but being an “action for an act done” that act, being the dispossession by the municipality with a view to being restored to possession, falls under the provisions of the first paragraph of section 48 of Bombay Act II of 1884.

* Second Appeal, No. 827 of 1891.

† Section 48 of the Bombay District Municipal Act Amendment Act (Bombay Act II of 1884) —

No action shall be commenced against any municipality, or against any officer or servant of a municipality, or any person acting under the orders of a municipality, for anything done or purporting to have been done, in pursuance of this Act, or of the principal Act, without giving to such municipality, officer, servant or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of;

and in the case of any such action for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered and shall pay all costs incurred by the defendant after such tender.

‡ Section 86 of the Bombay District Municipal Act (Bombay Act VI of 1873) :—

No action shall be brought against the municipality, or any of their officers, or any person acting under their direction, for anything done or intended to be done under this Act, until

[20] SECOND APPEAL from the decision of S. Tagore, District Judge of Sholapur.

The plaintiff sued the municipality of Sholapur to recover possession of land and Rs. 15 as damages, alleging that the municipality on the 20th January 1889, wrongfully pulled down certain huts on the land which belonged to him, and built new huts thereon and stored their materials therein. The plaintiff prayed that the municipality should be directed to remove the huts and the materials stored therein and to vacate the site and to deliver it to the plaintiff. It was further alleged in the plaint that the president of the municipality confirmed the order of the managing committee (under which the huts originally standing were pulled down on the 15th May 1889), and that the plaintiff gave notice to the municipality on the 25th May 1889, of his intention to bring the present suit. The plaint stated that the cause of action accrued on the 20th January 1889, and the suit was filed on the 15th July 1889.

The municipality claimed the property as its own.

The Subordinate Judge held that under section 48 of the Amended District Municipal Act (Bombay Act II of 1884), which was applicable to the present suit, the claim was barred, as the action was not instituted within three months from the act complained of, as laid down in that section. He, therefore, rejected the claim.

The plaintiff appealed, and the District Judge concurring with the Subordinate Judge confirmed the decree.

Plaintiff preferred a second appeal.

Gokuldas K. Parekh for the Appellant:—The lower Courts were wrong in holding that the present suit was governed by section 48 of Bombay Act II of 1884. The first paragraph of that section contemplates a suit for any act done or purport-**[21]**ing to have been done by the municipality. Our present suit is purely a suit in ejectment, and that being so, it is not a suit for any act done.

The second paragraph of that section is not applicable, because it relates to a suit for damages only. We, no doubt, seek to recover damages in the present case, and our claim for damages may be held barred under the clause, but not the claim for restoration of possession.

If section 86 of the old Act (Bombay District Municipal Act VI of 1873) be read with section 48 of the present Act, it will be found that section 48 applies only to those cases in which monetary compensation for a wrongful act is claimed, and not to suits in ejectment.

Mahadeo Waman Bhat, for the Respondent, was not called upon.

Sargent, C. J. :—We agree with the lower Courts in their construction of section 48 of Bombay Act II of 1884, the language of which is very different from that of section 86 of Bombay Act VI of 1873. The words "in the case of any such action for damages" show clearly that it was contemplated that

the expiration of one month next after notice in writing shall have been delivered or left at the office of the municipality, or at the place of abode of the intended defendant, stating with reasonable particularity the cause of action, and the name and place of abode of the intended plaintiff;

and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so delivered, and unless such notice be proved, the Court shall find for the defendant, and every such action shall be commenced within three months next after the passing of the final order by the municipality or officer having power to pass such order, and not afterwards;

and if any person to whom such notice is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

there might be actions of another description, to which the provisions in the former paragraph would be applicable. In other words, there is no reason for concluding, as was done in *Sorabji Nassarvanji Dundas v. The Justices of the Peace for the City of Bombay*, 12 Bom. H. C. Rep., 250 at p. 254 (A.C.J.), upon the language of the corresponding section of the former Act, that the section only contemplates "suit to recover monetary compensation for a wrongful act."

A suit in ejectment—not being a suit brought to recover damages "for an act done or intended to be done"—was excluded under that Act, but being an "action for an act done," that act being the dispossession by the defendant with a view to being restored to possession, must be held to fall under the provisions of the first paragraph of the section of the Act of 1884. We must, therefore, confirm the decree, with costs.

Decree confirmed

NOTES.

[This was overruled in (1896) 22 Bom., 289 F.B. See also (1895) 19 Bom., 407; (1900) 25 Bom., 142; (1910) 32 Mad., 371.]

[22] APPELLATE CIVIL.

The 16th November, 1892.

PRESENT :

MR. JUSTICE BAYLEY, CHIEF JUSTICE (ACTING), AND MR. JUSTICE CANDY.

Swamirao and another.....(Original Defendants) Appellants

versus

Padapa bin Bhujangrav..(Original Plaintiff) Respondent.*

Watan—Watandar—Mortgage of watan property—Adverse possession of watan property—Limitation—Succession—Entry of Watan in name of trespasser—Effect of Gordon Settlement effected with trespasser.

Bhujangrav Desai died in 1847, leaving his two widows Kalova and Ramova. The plaintiff Padapa was born to Ramova in 1848, i.e., the year after his death. Bhujangrav Desai's *watan* had been attached by Government in 1844, but in 1848 or 1849 Government restored a small portion of it, entering it in the name of Kalova and refusing to recognise the infant Padapa. In 1865 the Government restored the rest of the *watan*, again acknowledging Kalova as the holder, the agreement with her being under "the Gordon Settlement", (as to the nature of this settlement, see I. L. R., 15 Bom., 13). In 1865 Kalova mortgaged two villages (part of the *watan*) to one Shrinivas (father of the defendants), who was the *watan karkun*, for Rs. 9,900, which had been advanced by him to Kalova while the *watan* was under sequestration. Possession was given to Shrinivas, and the village officers were directed to pay him the revenues. Subsequently Kalova repented of her bargain, and directed the village officers not to pay the revenues to Shrinivas. He accordingly brought a suit against her for the revenues of 1869-70 and obtained a decree, in execution of which he sold the villages and bought them at the sale. In 1878, however, the Collector cancelled the sale under the Watan Act (III of 1874).

In 1878 Shrinivas obtained a further decree against Kalova for the revenue of two years (1870-72) and for possession as mortgagee. He got possession through the Court in 1875.

Kalova and Padapa, who had been on good terms, quarrelled, and on 16th March 1872, Kalova adopted one Balapa as a son to her deceased husband Bhujangrav. In December 1872, Padapa sued Kalova and Balapa, praying that he might be declared the son of Bhujang-

* Appeal, No. 93 of 1889.

rav, and that the adoption of Balapa might be cancelled. In 1879 the High Court held that Padapa was the legitimate son of Bhujangrav, and that Balapa's adoption was invalid. The legitimacy of Padapa being thus established, the Collector, in 1878, entered the *watan* in his name. At that time and until 1880 Padapa and Shrinivas were on friendly terms, the two having joint possession of the mortgaged villages, Padapa being subsequently to October 1878, the recognised occupant, and Shrinivas taking some, if not all, of the revenues of the two villages. In 1880 Shrinivas died, and his sons, the defendants, quarrelled with Padapa, who in 1881 obtained an order from the Collector directing the village officers to pay the revenues of the two villages to him and not to the defendants. This order was subsequently set aside, and thereupon Padapa in August 1887, filed the present suit to have the mortgage executed by Kalova to [23] Shrinivas on 15th September 1865, declared null and void, and to recover possession of the two villages. In the alternative, he prayed for redemption of the mortgage. The defendants pleaded (*inter alia*) that the villages were not *watan*; that they were entitled to the villages by reason of adverse possession; that the suit was barred by limitation, and that the plaintiff was estopped from disputing the mortgage, &c.

Held (1), on the evidence, that the property in question was part of a *desai watan* and as such was held on service tenure.

(2) That the property in question was subject to the rule which was in force in 1865 when the mortgage to Shrinivas was executed, *viz.*, that alienation by way of mortgage of any portion of *watan* property had no force beyond the life of the *watandar* who mortgages it.

(3) That the plaintiff having been declared to be the legitimate son of Bhujangrav he was, from the date of his birth in 1843, the rightful *watandar*, and Kalova, unless she was manager acting on his behalf, was a trespasser. The fact that Government had entered the *watan* in her name, and that the "Gordon Settlement" was effected with her, would not make her *watandar* as long as Bhujangrav's son (the plaintiff) was alive.

(4) That if Kalova was a mere trespasser, then the plaintiff's right to recover the lands free from incumbrance, on the ground that he was the *watandar*, had been lost by limitation, and the property had become Kalova's by adverse possession. The plaintiff, however, as her step-son, was her heir. The mortgage was proved and was binding on him as heir, and as such he had a right to redeem it.

FIRST APPEAL from the decision of Thomas Moore, First Class Subordinate Judge of Sholapur.

One Bhujangrav Desai, who owned service *watan* property in the Sholapur District, died on the 27th September 1847, leaving two widows Kalova and Ramova. In the year 1844 the *watan* had been attached by the Government, because he declined to produce his *sanad* relating to the *watan* before the Inam Committee. After his death, *viz.*, on the 15th September 1848, Ramova, one of the two widows, gave birth to the plaintiff Padapa.

During the year 1848-49 the Government restored a portion of the *watan* to the other widow Kalova, and placed the remaining *watan* property under sequestration, which continued until 1865. In the meanwhile, Ramova presented a petition to the Government on behalf of her minor son (the plaintiff), but on the 15th February 1849, the Government rejected her petition and decided that Kalova should be allowed to retain possession of the *watan*.

[24] On the 15th May 1850, Ramova applied on behalf of her son for permission to sue *in forma pauperis*, but the application was rejected on the 8th June 1850, being opposed by Kalova, who disputed the son's rights as Bhujangrav's heir.

On the 9th May 1864, the Government confirmed Kalova's right, and in 1865 restored the rest of the *watan* to her under the terms of the Gordon Settlement, (as to the nature of this settlement, see I. L. R., 16 Bom., 15), without any objection on the part of either Ramova or Padapa.

On the 15th September 1865, Kalova mortgaged two villages, Areshankar and Wadwadqi (part of Bhujangrav's service *watan*) to the defendant Shrinivas, who was the *watani karkun*, for Rs. 9,900. Possession was given to the mortgagee, and the village authorities were also desired by Kalova on the 25th September to recognise him as mortgagee in possession, and he received the revenues. On the 15th April 1869, Kalova executed a second mortgage of the same property to Shrinivas for Rs. 3,000. The mortgagee continued in possession for a time, but in that same year (1869-70) Kalova directed the village officers to stop paying revenue to the mortgagee, and recovered it herself. The mortgagee Shrinivas thereupon filed Suit No. 203 of 1870 and got a decree for possession and for the revenues of 1869-70. Kalova appealed, and the decree was confirmed in appeal (No. 121 of 1871). As Kalova did not satisfy the decree, Shrinivas sold the two villages in execution and bought them himself at the sale. The sale, however, was set aside by the Collector. In the meanwhile, Shrinivas had to file another suit (No. 59 of 1873) against Kalova to recover the revenues of the years 1870-71, 1871-72 and for possession. He got a decree and obtained possession of the villages through the Court in 1875.

From the time of the mortgage of 1865 Kalova, Ramova and Padapa had been on good terms; but in the year 1872 differences arose between Kalova and Padapa. On the 16th March 1872, Kalova adopted one Balapa as son to Bhujangrav. Padapa in consequence on the 4th December 1872, filed a suit against Balapa and Kalova praying that he might be declared to be the son of the deceased Bhujangrav and the adoption of Balapa [25] by Kalova be set aside. The suit came up to the High Court (see I. L. R., 1 Bom., 248), and after remand was finally decided by that Court on the 21st January 1879, in favour of Padapa. In November 1877, while the above proceedings were pending, Kalova died. In 1878, the suit being decided by the lower Courts in Padapa's favour after the remand by the High Court, the Collector entered the *watan* in his name.

Shrinivas, the mortgagee, died in the year 1880, and after his death, his elder son, the first defendant Swamirao, applied to the Collector to transfer the two mortgaged villages to his name. The Collector rejected the application on the 4th April 1881, and directed the village officers to pay the revenue of the two villages to Padapa. Swamirao appealed to the Revenue Commissioner, who in February 1886, passed an order directing that the revenue of the two villages should be given to Swamirao until Padapa obtained a decree of a competent Court to the contrary. Against this order Padapa appealed to the Government, which confirmed it on the 7th January 1887. Thereupon, Padapa filed the present suit on the 16th August 1887, for a declaration that the mortgage-deed executed by Kalova to Shrinivas on the 15th September 1865, was null and void, and to recover possession of the two villages, and, in the alternative, for the redemption of the mortgage.

The defendants Swamirao and Devrao, the sons of Shrinivas, replied (*inter alia*) that the villages in dispute did not appertain to the service *watan* of Bhujangrav, but had been conferred on him for his maintenance; that the cause of action (if any) had accrued to the plaintiff in the year 1850, when Ramova's application to sue *in forma pauperis* was rejected in consequence of the opposition of Kalova; that the claim was barred by defendant's adverse possession for about twenty-five years and by Kalova's adverse possession for about forty years; that the claim was also barred by reason of the plaintiff having failed to bring the suit within one year from the date at which he attained majority; that they (the defendants) had thus become the owners of the villages; that if their ownership were not held to be established, they were

willing to allow the plaintiff to redeem on payment of Rs. 66,000 on account of the mortgage; that the mortgage-deed executed [26] by Kalova in the year 1865 was valid, and that the money had been advanced to pay off debts and to defray the expenses incurred in getting the *watan* released from attachment; that, after Bhujangrav's death, the *watan* was managed by Kalova as owner, and that the plaintiff was bound by her acts; that her possession of the estate was adverse to the plaintiffs, and that, besides the mortgage-bond for Rs. 9,900, there was another mortgage-bond of Rs. 3,000 executed by Kalova on the 15th April 1869, stipulating to pay both the amounts at once: therefore, unless the debt of Rs. 3,000 was paid, the plaintiff was not entitled to redeem the mortgage of Rs. 9,900.

The Subordinate Judge found (1) that the mortgage of Rs. 9,900 relied on by the defendants was not proved; (2) that the mortgage-debt was not proved to have been contracted by Kalova for lawful and necessary purposes; (3) that the property mortgaged was *watan*, and was not liable for the debt, and that the plaintiff's cause of action arose in the month of February 1886, when the Revenue Commissioner's order was passed. He, therefore, allowed the claim.

The defendants appealed.

P. M. Mehta (with Shamrao Vitthal) for the Appellants (defendants):—The property in dispute is not service *watan*, as is shown by the original *sanad* dated 1762. It is, therefore, alienable like any other property. Even admitting that the property is service *watan*, still the service being commuted, and the summary settlement being made applicable, it has lost its characteristics of inalienability—*Radhabai v. Anantrav*, I. L. R., 9 Bom., 198; *Vishwanath v. Bagubai*, P. J., 1890, p. 28.

The lower Court was wrong in holding that the mortgage of Rs. 9,900 was not proved. There is abundant evidence in the case to prove it. (Evidence referred to).

The plaintiff has never until now repudiated the mortgage, although there have been several judicial proceedings in connection with it. He cannot repudiate it now.

Further we say the suit is barred by limitation. The plaintiff claims as the son of Bhujangrav. Therefore, his right came into [27] existence in 1848, when he was born. The possession of his step-mother Kalova was from the beginning adverse to him, because she claimed to hold the property as that of the deceased Bhujangrav and not as that of the plaintiff whose legitimacy she denied. Again, in the year 1850, when Ramova applied to sue *in forma pauperis* on behalf of the plaintiff, Kalova, disputed his right as heir of Bhujangrav. Kalova's possession, therefore, has been adverse, at least from the year 1850, with respect to that portion of the *watan* property which was then already restored to her. The plaintiff attained his majority, according to Hindu law, in the year 1864, and, giving him the benefit of three years under the Limitation Act, his right to sue became barred in the year 1867. The defendants claim to be in possession under Kalova, and her possession having been adverse, our possession has also been adverse from the date of the first mortgage in 1865—*Mitra on Limitation*, p. 133; *Madhava v. Narayana*, I. L. R., 9 Mad., 244.

Jardine (with Ghanasham N. Nadkarni) for the Respondent:—The *sanad* granted in the year 1886 and the other documentary evidence in the case show that the property is both service and *deshmukhi watan*. No holder can alienate *watan* property beyond his life-time—*Apaji v. Keshav Shamrao*, I. L. R., 15 Bom., 13.

As to the mortgage, no evidence of consideration has been given, nor has any necessity for contracting the debt been proved. Admitting the mortgage

to be valid, it would be good only during the life-time of Kalova, the mortgagor the property being *watan*. It would not bind succeeding holders—West and Bühler, p. 101.

The plaintiff's claim is not barred by limitation. Kalova's possession cannot be said to be adverse, because she being the elder of the two widows naturally held the property as manager. The plaintiff's legitimacy having been judicially established, Kalova cannot be held to have retained possession in her own right. But even if her possession was adverse, the plaintiff's claim would not be barred, because after her death he was entitled to succeed as the nearest heir of Bhujangrao, if not as adopted son.

[28] *P. M. Mehta* in reply :—In the former suit the Court held Padapa to be a legitimate son, and that being so his right to succeed to the estate of Bhujangrav accrued to him at his birth. The possession of his step-mother Kalova was, therefore, adverse to him. He being in existence she could not legally hold the property as Bhujangrav's widow. She could do so only as trespasser. If she acquired it as trespasser, it was her *stridhan*. It was not a widow's estate to which she succeeded, because she was not the widow of a childless Hindu. Moreover, she had been all along asserting her right to the property, which she need not have done if she had been the widow of a childless Hindu, for in that case it must have been acknowledged. The title which she acquired was not that of a Hindu widow; she got it by the operation of the Limitation Act—*Babu v. Bhikaji*, 1 L. R., 14 Bom., 317. On her death the plaintiff, as her step-son, succeeded, if there are no other heirs, to her property, but subject to all the liabilities created by her, and, therefore, subject to the defendants' mortgage.

As to estoppel, we say that as Padapa stood by and allowed the property to be charged with money, the property must pay the charge. Kalova's death does not destroy the charge, which was a mortgage and not a charge for her life.

Candy, J. :—Some of the facts of this case are to be found in *Kalova v. Padapa*, 1 L. R., 1 Bom., 248.

Bhujangrav Desai died on 27th September 1847, leaving two widows, Kalova and Ramova. In the following year Padapa was born to Ramova. Bhujangrav's *desai watan* had been attached in 1844, because he would not show his *sanad*. In 1848 or 1849 Government restored a small portion of the *watan*, but entered it in the name of Kalova, refusing to recognise the infant Padapa. Ramova, on behalf of Padapa, made attempts to sue Kalova to establish the legitimacy of the infant, but the case did not then come to trial. It seems that subsequently Kalova and Ramova must have become friends, for they apparently lived together with Padapa.

In 1865 Government restored the rest of the *watan*, again acknowledging Kalova as the holder, the agreement with her being under the "Gordon's Settlement."

[29] On 15th September 1865, Kalova mortgaged the two villages of Areshankar and Wadwadgi (part of the above-mentioned *watan*) to one Shrinivas, who was the *watani karkun*, the consideration recited in the bond being a sum of Rs. 9,900, the balance of an account of all the sums advanced to Kalova by Shrinivas from time to time while the *watan* was under sequestration. Possession of the villages was given to Shrinivas, the village officers being directed to pay him the revenues.

Padapa was not a party to the mortgage (he was then about seventeen); but it appears that he was then on good terms with Kalova and living with her. All went well for a few years, till Kalova repented of her bargain, and directed the village officers not to pay the revenues to Shrinivas. Thereupon Shrinivas filed Suit No. 203 of 1870 against Kalova to recover the revenues for 1869-70;

and the Subordinate Judge held (27th October 1871) that the mortgage-bond was proved and was for consideration, and that Shrinivas had obtained possession of the two villages under the bond; and he decreed that Kalova should pay Rs. 995-9-3 for the revenues of the year 1869-70. As Kalova did not pay this sum, Shrinivas in execution bought the villages, but in 1878 the Collector cancelled the sale under the *Watan* Act (III of 1874). In the meanwhile, Shrinivas had been forced to file another suit against Kalova (No. 59 of 1873) for the revenues of two more years (1870-71, 1871-72), and for restoration to possession as mortgagee. He obtained a decree on 5th June 1873, and obtained possession of the villages through the Court in 1875.

To return to Kalova and Padapa. They had been on good terms, but having quarrelled because Padapa did not marry Kalova's niece, Kalova, on 16th March 1872, adopted one Balapa as a son to her deceased husband Bhujangrav. On 4th December 1872, Padapa filed Suit No. 1299 of 1872 against Kalova and Balapa, and prayed that he might be declared the son of the deceased Bhujangrav, and the adoption of Balapa by Kalova be set aside. The Subordinate Judge held that the claim was barred under Act XIV of 1859, section 1, clause 16, and section 11; but, in appeal, the Assistant Judge held that the suit was not barred, and this view was upheld, in second appeal, by the High [30] Court in *Kalova v. Padapa*, I. L. R., 1 Bom., 248, and the case was remanded for determination of the questions whether Padapa was the son of Bhujangrav, and, if so, as to the validity of the adoption of Balapa. The Subordinate Judge, on remand, found that Padapa was the legitimate son of Bhujangrav, and that the adoption of Balapa was not valid. Kalova and Balapa both appealed, but the Assistant Judge on 31st July 1878, confirmed the decree of the Subordinate Judge. Kalova had died in November 1877, but Balapa made a second appeal to the High Court, which, on 21st January 1879, confirmed the Assistant Judge's decree (no written judgment).

Padapa having established his legitimacy, and Kalova being dead, the Collector in 1878 entered the *watan* in his name. At that time it is evident that Padapa and Shrinivas were fast friends: in fact, it was mainly owing to the aid and deposition of Shrinivas that Padapa established his legitimacy. As to the possession of the two mortgaged villages, it appears that Kalova had put up one Gopaldas to obstruct the execution of the decree of 1873 (mentioned above). This obstruction was removed, and Shrinivas sued Gopaldas for the revenues of 1873-74 and 1874-75. This case was finally decided by the High Court in Appeal No. 22 of 1879 (26th January 1880). It appears also that tenants were set up antagonistic to the tenants of the mortgagee, and several suits ensued (see Exhibits 155, 158, 159, 160, 173, 174, 175). But it is evident that throughout these proceedings Padapa and Shrinivas were acting in concert. In 1879 Padapa himself stated (Exhibit 116) that possession had been with Shrinivas as mortgagee. In short, there seems to have been a joint possession of Shrinivas and Padapa, the latter since October 1878, being the recognised occupant, the former taking some, if not all, of the revenues of the two mortgaged villages. In 1879 Shrinivas deposed (Exhibit 18) that there were no differences between himself and Padapa as regards the '*vahvat*'; and this is borne out by the letters (Exhibits 36 to 39), which apparently relate to 1878-79. But in 1880 Shrinivas died, and his sons, Swamirao and Devrao (hereafter called the defendants), soon fell out with [31] Padapa, who in 1881 obtained an order from the Collector, directing the village officers to pay the revenues of the two villages to him and not to the defendants. In March 1886, defendants obtained an order of the Revenue Commissioner (Mr. A. Crawford), setting aside the Collector's order as illegal, and directing that officer to issue

orders to the village officers to pay the revenues to defendants "until Padapa brings a decree of a competent Court to the contrary." Padapa appealed to Government, but Government (without stating reasons) confirmed the order of the Revenue Commissioner on 7th January 1887.

Accordingly, on 16th August 1887, Padapa filed the present suit to have it declared that the bond, executed by Kalova to Shrinivas on 15th September 1865, was null and void, and for possession of the two villages; and, in the alternative, for redemption of the mortgage.

First, as to the nature of the property: Mr. Melita contended that it was originally non-service *watan*; but there is a mass of evidence showing that it is part of a *desai watan*, and, as such, of course it was held on a service tenure.

Next it was contended that by the application of a summary settlement and commutation of service the property became alienable like the ordinary landed property of the district. This contention is likewise bad. "Lands held for service" could never be settled under Bombay Act II of 1863 (the Summary Settlement Act which applies to the southern districts of the Bombay Presidency whence the present case comes), such lands being expressly excepted from the operation of the Act. It was for this reason that Government carried out what is termed the "Gordon Settlement," to which legal effect was subsequently given by section 15 of Bombay Act III of 1874. The report and appendices of Mr. Gordon's Committee on the Sholapur District, (Areshankar and Wadwadgi were formerly in the Mangoli Taluka, Sholapur District) which we have perused, show that, whatever may have been the case in other districts, the settlement made with the district hereditary officers of Sholapur was not intended to convert the *watan* lands into the private property of the *watandars*, with the necessary incident [32] of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of service, remained intact. It was a four-annas "*judi*," and there was no extra *muzarana* levied for the conversion of the *watan* into private property. (See also Colonel Ethoridge's mention of the Gordon Settlement in Sholapur, p. 41, Government Selection, N. S., No. CXXXII). Apparently no *sanad* was issued to Kalova in accordance with the terms of the settlement; but if any *sanad* was issued to her, there is no reason to suppose that it materially differed from that which was subsequently issued to Padapa (Exhibit 50), and which is the same as the form of *sanad* issued to district hereditary officers in the Southern Maratha Country. (See p. 142 of General Rules in force in the Revenue Department under the Government of Bombay). There is nothing in this *sanad* to take the property out of the well-established rule (which was in force in 1865 when the mortgage to Shrinivas was executed), that alienation by way of mortgage of any portion of *watan* property had no force beyond the life of the *watandar*-mortgagor. (See *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa*, I. L. R., 5 Bom., 435). The Commissioner, Mr. Crawford, thought that the *sanad* made a distinction between alienation by way of sale and alienation by way of mortgage, and that as the alienation to Shrinivas was of the latter description, the mortgagee (if unredeemed) could not be ejected as long as there was a male holder of the *watan* in existence. But there is no warrant for any such distinction, which is not to be found in the *sanad* or in the cases which establish the principle above quoted.

Prima facie, then, Padapa, if the successor to Kalova, is entitled to recover the *watan* lands free from any mortgage executed by his predecessor. This was the ground stated by the Subordinate Judge, who said "as no mortgage or alienation of a *watan* beyond the life-time of the incumbent would be valid, the property is not liable for any debt, even if proved, after Kalova's death." But here we are met by the fact that Kalova was not the rightful incumbent.

of the *watan*, and Padapa is not her successor. Padapa has been declared by the Courts to be the [33] legitimate son of Bhujangrav. It follows, therefore, that from the date of his birth in 1848 he was the *watandar*, and Kalova, unless she was the manager acting on his behalf, was a mere trespasser. The fact that Government entered the *watan* in the name of Kalova, and that the "Gordon Settlement" was effected with her, would not make her the *watandar* as long as Bhujangrav's son was alive. If she was a mere trespasser, then his right to recover the lands free from any incumbrance, on the ground that he is the *watandar*, has been lost by statute.

It is unnecessary to inquire whether the mortgage may not be regarded as effected on behalf of Padapa, who was in 1865, and still is, the *watandar*. But we may remark that there is good reason for supposing that in 1865 Padapa (who was then of age) was living with Kalova, was cognizant of the mortgage, allowed Kalova to represent the estate, and acquiesced in the transaction. Certainly, it is clear that from 1877 (when Kalova died) to 1881, (when Padapa quarrelled with defendants), Padapa adopted the mortgage. He admitted the status of Shrinivas as mortgagee, and Shrinivas equally admitted the status of Padapa as representative of the mortgage.

But, apart from these considerations, regarding Kalova as a mere trespasser, Mr. Mehta for defendants admitted that Kalova or Kalova's heir was fully competent to redeem the mortgage. He also admitted that Kalova's heir was her step-son, the plaintiff Padapa. Assuming, as defendants contended, that Kalova fully represented the estate and purported to deal with the property as her own, and that the title of the rightful *watandar* was lost by limitation, in this case it so happens that the rightful *watandar* is Kalova's heir, and, therefore, his claim to redeem in the latter capacity cannot be resisted.

The Subordinate Judge found that the mortgage-bond was not proved, and that it was without consideration. But as to execution there can be no doubt: the plaint recites the fact. And as to consideration, it is evident that there was no fraud or collusion between Kalova and Shrinivas in the suit of 1870 (mentioned above): so even if Padapa could claim to be the successor of Kalova in the *watan* he would be bound by the decision in that suit (see *Radhabai v. Anantrao*, I. L. R., 9 Bom., 198). Of course if the bond was executed for the benefit of the estate, and Padapa adopted and acquiesced in the mortgage transaction, he cannot now plead want of consideration. Nor can he do so as heir of Kalova, being bound by the finding against her that the mortgage was for good consideration.

It only remains, therefore, to take the account.

Mr. Mehta abandoned the claim for Rs. 19,995 as recited in the 27th paragraph of the written statement.

With regard to the mortgage-bond for Rs. 3,000 recited in the 26th paragraph of the written statement, the Subordinate Judge framed an issue (the fourth) and recorded a finding "in the affirmative," noting that "the question whether the mortgagor has a right to redeem the present mortgage irrespective of the separate mortgage for Rs. 3,000 will be considered after the fifth issue has been disposed of." The point seems to have subsequently escaped the notice of the Subordinate Judge, for it was not further considered by him. The eighth paragraph of the memo. of appeal to this Court is that "the lower Court did not allow the defendants sufficient opportunity to prove the second mortgage of 1869 for Rs. 3,000." But counsel did not press the point or show in any way that defendants had not the fullest opportunity of proving the bond for Rs. 3,000. Under these circumstances, we cannot now allow that bond to be proved.

As regards the debt due on the bond for Rs. 9,900, we think that, as stated in the plaint, the plaintiff must be taken as having enjoyed possession of the villages from the date of the Collector's order (4th April 1881) till January 1887. For that period he must pay simple interest at 12 per cent., the rate recited in the bond. For the remaining period defendants must be taken to have been in possession, and, according to the stipulation in the bond, their receipts of the rents or profits are in lieu of interest. If obstruction was offered to their full enjoyment of the rents and profits, the mortgagee had his remedy, a remedy which he availed himself of in previous years as shown by the suits which he filed. That matter cannot now be gone into.

[35] It must be understood that this decree does not deal with the property recited in the 29th paragraph of the written statement. No issue was framed in regard to that point.

We amend the decree of the Subordinate Judge, by allowing the plaintiff to redeem the villages of Areshankar and Wadwadgi on paying, within six months from this date, the sum of Rs. 9,900 with 12 per cent. simple interest on the said sum of Rs. 9,900 from 4th April 1881 to 7th January 1887, and, in default of payment, his mortgage will be foreclosed.

Defendants must have the costs of this appeal. Each party to pay his own costs in the Court below.

Decree amended.

NOTES.

[The Privy Council reversed this decision on appeal in (1900) 24 Bom., 555. See also (1898) 1 O. C., 174.]

[18 Bom. 35] APPELLATE CIVIL.

The 25th November, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Motilal Kashibhai.....(Original Plaintiff) Applicant
versus
Nana *alias* Langda Mukund Patil.....(Original Defendant No. 2)
Opponent.

Civil Procedure Code (Act XIV of 1882), sec. 622—Application and purpose of the section—Revision.

An application under section 622 of the Civil Procedure Code (Act XIV of 1882) cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by section 591, which provides that they may be made a ground of objection in the appeal against final decree.

The purpose with which section 622 was framed was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court where there would otherwise be no remedy.

THIS was an application under the extraordinary jurisdiction of the Court, under section 622 of the Civil Procedure Code (XIV of 1882), against an interlocutory order passed by Rao Sahib Prabhakar Vitthal Gupte, Second Class Subordinate Judge of Bassein.

Plaintiff Motilal Kashibhai brought a suit against (1) Raghunath Patil, (2) Nana, and (3) Botmaria, to recover possession of a house. On the day of fixing

Application under Extraordinary Jurisdiction, No. 143 of 1892.

issues Nana alone appeared, and after the settlement of issues the hearing was adjourned till the 1st [36] December 1891, on Nana's application to enable him to instruct a pleader. On the day so fixed for hearing, all the defendants being absent, the Court passed a decree for the plaintiff. On the 6th December 1891, Nana and Botmaria applied to the Court to set aside the decree and restore the suit to the file, stating that they had been prevented by accident from attending the Court on the day fixed. The Court, thereupon, issued notice to the plaintiff to show cause why the decree should not be set aside and the suit restored to the file for rehearing, and, after having heard both the sides, passed an order setting aside the decree and directing the suit to be proceeded with only so far as Nana was concerned. The decree with respect to the other two defendants was allowed to stand, because Raghunath had not appeared at all, and Botmaria had not appeared on the day on which the issues were settled.

Against the order setting aside the decree with respect to Nana, the plaintiff applied to the High Court, and obtained a rule *nisi*, to set aside the order under section 622 of the Civil Procedure Code (XIV of 1882).

Govardhanram M. Tripathi appeared for the Opponent Nana to show cause:—We take a preliminary objection, and submit that this application cannot be entertained under section 622 of the Civil Procedure Code, inasmuch as section 591 has provided a remedy in case of orders such as the one now in question—*Chattar Singh v. Lekhraj*, I. L. R., 5 All., 293; *Farid Ahmad v. Dulari, Bibi*, I. L. R., 6 All., 233; *In re Nizam of Hyderabad*, I. L. R., 9 Mad., 256.

Ganesh Krishna Deshamukh, for the Applicant, in support of the rule:—Interlocutory orders such as the one in question can be interfered with under section 622 of the Civil Procedure Code—*Dhapi v. Ram Pershad*, I. L. R., 14 Cal., 768. The exercise of the extraordinary jurisdiction is discretionary, the true interpretation of section 622 being that, in case of orders which are appealable, the High Court cannot interfere, and that, in the case of those which are unappealable, the High Court has a discretion to interfere, which will be exercised with regard to the circumstances of each case.

[37] **Sargent, C. J.**:—The expression "case" in section 622 of the Code of Civil Procedure may be, as stated by the Court in *Dhapi v. Ram Pershad*, I. L. R., 14 Cal., at p. 780, wide enough to include an interlocutory order. But a word of such general import must be controlled by due regard to the purpose with which section 622 was framed. This, it cannot be doubted, was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court, when there would otherwise be no remedy. In the case of those interlocutory orders (such as the present one), against which no immediate appeal lies, a remedy is still supplied by section 591, which provides that the order may be made ground of objection in the appeal against the final decree. We may remark that the Madras and Allahabad High Courts in *In re Nizam of Hyderabad*, I. L. R., 9 Mad., 256, and *Chattar Singh v. Lekhraj*, I. L. R., 5 All., 293, differing from the Calcutta High Court, take this view of the section.

We must, therefore, discharge the rule, with costs.

Rule discharged.

NOTES.

[Similar decisions were given in the following cases:—(1899) 19 A. W. N., 210; (1906) 30 Mad., 230; (1909) 12 O. C., 405; (1908) 11 O. C., 238; (1907) 1 S. L. R., 120; (1908) 2 S. L. R., 22; (1900) P. L. R., 22; (1904) P. R., 14. See also (1914) 16 M. L. T., 101; 2 I. C., 191; (1915) 28 I. C., 189 (Madras).]

[18 Bom. 37]
APPELLATE CIVIL.

The 5th December, 1892.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Namdev.....(Original Defendant) Appellant
versus

Ramchandra Gomaji Marwadi.....(Original Plaintiff) Respondent.*

Decree—Execution—Auction-purchaser—Symbolical possession—Judgment-debtors remaining in actual possession—Subsequent attempt by purchaser to take possession—Obstruction—Application to remove obstruction—Application converted into a suit under Section 331 of Civil Procedure Code (XIV of 1882)—Limitation—Adverse possession—Limitation Act (XV of 1877), Sec. 3, and Sch. II, Arts. 138, 144, 167—Civil Procedure Code (XIV of 1882), Secs. 328, 329, 331.

* The plaintiff purchased the property in dispute at an auction sale in execution of a decree, and on the 14th August 1877, he took formal possession, but the judgment-debtors remained in actual possession. On 18th September 1889, the plaintiff proceeded to take possession, but was obstructed by the defendant, who alleged that he had purchased the property from the judgment-debtors in 1888. The plaintiff [38] then applied for the removal of the defendant's obstruction, and his application was registered as a suit under section 331 of the Civil Procedure Code (XIV of 1882).

Held, that the plaintiff's claim was barred by limitation. When his application was converted into a suit under section 331, the rights of the parties had to be determined as if an ordinary suit for possession had been instituted against the defendant, and either article 138 or article 144 of the Limitation Act (XV of 1877) applied. In either case the defendant could avail himself of the judgment-debtors' possession, which was adverse to the plaintiff.

SECOND APPEAL from the decision of Dr. A. D. Pollen, District Judge of Poona.

One Gangadhar Keshav Bhat obtained a decree (No. 1628 of 1876) against four brothers, Hari, Narayan, Rama and Vithu. In execution of that decree the property in dispute was sold by auction and was purchased by the present plaintiff, Ramchandra Gomaji Marwadi, on the 14th August 1877, who took formal possession through the Court, but the judgment-debtors remained in actual possession. Subsequently, viz., in the year 1889, the plaintiff having himself obtained a decree (No. 126 of 1889) against the four brothers, sold the same property in execution and purchased it. On the 18th September 1889, he proceeded to take possession, but was obstructed by the defendant Namdev, who alleged that on the 3rd January 1888, he had purchased the property from the judgment-debtors. The plaintiff in October 1889, presented an application for the removal of the defendant's obstruction, and the application was registered as a suit under section 331 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge found that the defendant acquired no right to the property in dispute under his purchase, because his vendor's right, title and interest had been already purchased by the plaintiff in the Court sale on the 14th August 1877, under Gangadhar Keshav Bhat's decree. He, therefore, allowed the plaintiff's claim.

On appeal by the defendant, the Acting District Judge (T. Hart-Davies) sent down the following issue for trial :—

"Is the claim time-barred?"

The finding of the Subordinate Judge on the above issue was in the negative, on the ground that as the plaintiff's application [39] for the removal of the defendant's obstruction was made within thirty days from the date of the obstruction, the claim was not barred under article 167,* Schedule II of the Limitation Act (XV of 1877).

On appeal the District Judge, concurring with the Subordinate Judge, confirmed his order.

The defendant preferred a second appeal.

Mahadev Bhaskar Chavbal, for the Appellant (defendant):—The plaintiff's claim now to take possession is barred. He got symbolical possession in August 1877, and his present application was made in October 1889, i.e., more than twelve years subsequently. The plaintiff allowed the judgment-debtors to remain in possession, and they sold the property to the defendant. The possession of the judgment-debtors was adverse to the respondent (the plaintiff) and we claim through them. The suit was, therefore, clearly barred.

Gangaram B. Rele, for the Respondent (plaintiff):—The point of adverse possession is raised for the first time in second appeal. It was not raised in the written statement, nor was it raised in either of the lower Courts.

[SARGENT, C. J.:—The issue sent down by the Acting District Judge includes the point:]

Neither of the lower Courts understood the issue to mean whether the claim was barred by adverse possession. It was after the issue was sent down that the Subordinate Judge came to the conclusion that the claim was not time-barred, being filed within thirty days from the date of obstruction. It was not suggested, in appeal, that the Subordinate Judge did not understand the issue, nor did the defendant raise any objection to the Subordinate Judge's finding. The District Judge also understood the issue to mean whether the suit was filed within thirty days from the date of obstruction. The appellant should not be allowed, in second appeal, to raise a point which he did not raise, and never urged, in either of the lower Courts.

Sargent, C. J.:—We think both the Courts below have misapplied the Statute of Limitations in disposing of the first issue [40] sent down on remand. Article 167 of the second schedule of the Statute of Limitations required that the application contemplated by section 329 of the Civil Procedure Code (XIV of 1882) should be brought within thirty days from the obstruction, but when that application was converted into a suit, the rights of the parties had to be determined as if an ordinary suit for possession had been instituted by the decree-holder against the defendant. The issue as to the Statute of Limitations must, we think, have been intended by Mr. Hart-Davies to be determined in its double aspect, and that being so, either article 138 or article 144 would be

* [Art 167:—

Description of application.	Period of limitation.	Time from which period begins to run.
Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property.	Thirty days ...	The date of the resistance, obstruction or dispossession.]

applicable to the case. See *Lakshman v. Bisansing*, I. L. R., 15 Bom., 261, and *Lakshman v. Moru*, I. L. R., 16 Bom., 722. It is not a matter of importance which article is applied, as in either case the defendant will be able to avail himself of Hari's possession, which, after the petition by plaintiff, became adverse to the latter. Assuming article 144 to apply, the defendant would have acquired possession from Hari, which was the cause of "his liability to be sued" in the present suit, and would, therefore, fall under the definition of a defendant in section 3 of the Statute of Limitations.

The plaintiff's suit is, therefore, barred, and we must reverse the decree of the Court below and dismiss the plaint with costs throughout on the plaintiff.

Decree reversed.

NOTES.

[Symbolical possession is effective as against the judgment-debtor, but not as against third parties:—(1897) 19 All., 499; (1910) 6 I.C., 467; see also (1901) 3 Bom. L.R., 832; (1895) 21 Bom., 392; (1910) P.L.R., 70.]

[18 Bom. 40]

APPELLATE CIVIL

The 5th December, 1892.

PRESENT:

MR. JUSTICE TELANG AND MR. JUSTICE FULTON.

Bhagvantrai Munshi.....(Original Plaintiff) Appellant

versus

Mehta Bajurao.....(Original Defendant) Respondent.*

*Valuation—Valuation of suit—Suits Valuation Act (VII of 1887), Sec. 8—
Valuation for purposes of Court fees and for purposes of jurisdiction—
Jurisdiction—Appeal.*

In a suit for an account the valuation for purposes of Court fees determines the question of jurisdiction, the valuation for both purposes being the same under section 8 of Act VII of 1887.

[41] The plaintiff sued for an account, and valued the relief sought at Rs. 130. The suit was filed in the Court of a Subordinate Judge of the First Class. The Subordinate Judge rejected the claim. Thereupon, the plaintiff appealed to the High Court, valuing his claim in appeal at Rs. 10,505.

Held, that the appeal lay to the District Court, and not to the High Court.

APPEAL from the decree of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad, in Suit No. 567 of 1888.

The plaintiff sued for an account from May 1881, to 22nd July 1886, and to recover whatever might be found due to him by the defendant, alleging that the defendant was his *mukhtyar*, or agent, and as such entrusted with the management of his property consisting of houses, fields and an *inam* village called Vastral, situate in the Ahmedabad District. The plaintiff further alleged that on the 21st July 1888, he had revoked the defendant's *mukhtyarnama*, or power of attorney, and had given him notice to render an account of his management, but this he refused to do. Hence the present suit. The claim was valued at Rs. 130 for purposes of Court fees, and a stamp of Rs. 10 was affixed to the plaint.

The suit was filed in the Court of the First Class Subordinate Judge of Ahmedabad.

The Subordinate Judge, after taking accounts between the parties, rejected the plaintiff's claim *in toto*.

Against this decision the plaintiff appealed to the High Court. He valued his claim in appeal at Rs. 10,505.

The appeal was heard by TELANG and FULTON, JJ.

Govardhan M. Tripati for Respondent :—There is a preliminary objection to the appeal. The appeal in this case lies to the District Court, and not to the High Court. The plaintiff valued his original claim at Rs. 130 in the Court below. This valuation should be taken for purposes of Court fees, as well as for jurisdiction. Under section 8 of Act VII of 1887, the valuation for both purposes is the same. That being the case the appeal lies to the District Court under Act XIV of 1869—*Khushalchand v. Nagindas*, I. L. R., 12 Bom., 675.

[42] *Ganpat Sadashiv Rao* for Appellant :—The valuation of the suit, as given in the plaint, is for purposes of Court fees only. The suit involves a claim to property worth more than Rs. 5,000. That being the case, according to the established practice of this Court, the appeal lies to this Court and not to the District Court. Refers to *Manohar Ganesh v. Bawa Ramcharandas*, I. L. R., 2 Bom., 219. The law is well settled that valuation for purposes of Court fees is quite distinct from valuation for purposes of jurisdiction. Section 8 of Act VII of 1887 has no application to the present case. Nor would section 9 of the Act apply in the absence of any rules made by the High Court.

Telang, J. :—The plaintiff sued for an account, and in the plaint valued the relief sought at Rs. 130, stating at the same time that he would pay Court fee on any larger amount that might be decreed. The First Class Subordinate Judge rejected the claim, with costs. The plaintiff has now appealed to this Court, but a preliminary objection has been taken that, as the relief sought was valued at Rs. 130, the appeal lies not to this Court, but to the District Court. The appellant's pleader relies on the statement in the plaint that at the time of filing it there were no means of ascertaining the amount due, but that it was a very large sum, and that temporarily the relief sought was valued at Rs. 130. It was contended that this valuation was made merely for the purpose of ascertaining the Court fee payable, but we are unable to accept this view. In *Khushalchand v. Nagindas*, I. L. R., 12 Bom., 675, it was held that, in a suit for account, the valuation entered in the plaint for purposes of Court fee determined the question of jurisdiction, and the law thus laid down has been embodied by the Legislature in section 8 of Act VII of 1887 which was in force at the time this suit was instituted. We must, therefore, direct that the memorandum of appeal be returned to the appellant for presentation in the proper Court. The appellant must pay the costs incurred in this Court.

Appeal rejected.

NOTES.

[See also (1893) 18 Bom., 160 ; (1895) 20 Bom., 265]

[43] APPELLATE CIVIL.*The 13th December, 1892.*

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Dadabhai Dajibhai.....(Original Defendant No. 2) Applicant
versus

Diogo Saldanha.....(Original Plaintiff) Opponent.

*Jurisdiction—Contract—Performance of contract—Making of contract—**Goods to be shipped at Bombay to the plaintiff at Karwar—**Contract entered into and intended to be performed at Bombay.*

The plaintiff residing at Karwar sent a sum of money to Kemp & Co., (defendant No. 1), a firm at Bombay, asking them to send him certain goods. Kemp & Co. informed the plaintiff that they had not the goods required by him. The plaintiff thereupon telegraphed to them to pay the amount to defendant No. 2, a resident of Bombay, provided he shipped the goods. On the failure of defendant No. 2 to ship the goods, the plaintiff brought a suit against the defendants in the Court at Karwar to recover the amount. He claimed against Kemp & Co. (defendant No. 1) because they had paid the money to the second defendant before the goods were shipped, and against the second defendant because he had not shipped the goods, although he had received the money. The Court at Karwar was of opinion that Karwar was the place where the contract was to be performed, and that, therefore, it had jurisdiction to entertain the suit, and it passed a decree against defendant No. 2. The claim as against defendant No. 1 was dismissed.

Held, reversing the decree, that the understanding on which the money was paid to defendant No. 2 by Kemp & Co., and which was the agreement on which the plaintiff sued, was that the second defendant would ship the goods at Bombay to the plaintiff at Karwar. The contract, therefore, as between defendant No. 2 and Kemp & Co., acting on behalf of the plaintiff, was both entered into and intended to be performed at Bombay. The cause of action arose, therefore, in Bombay, and the Court at Karwar had no jurisdiction.

APPLICATION under the extraordinary jurisdiction of the High Court, under section 622 of the Civil Procedure Code, Act XIV of 1882, against the decision of Rao Bahadur Raghavendra Ramchandra, Acting First Class Subordinate Judge of Karwar in a Small Cause Suit.

The plaintiff resided at Karwar. The first defendant was the firm of Messrs. Kemp & Co., which carries on business at Bombay. The second defendant (the appellant) was one Dadabhai Dajibai, who also resided in Bombay.

The plaintiff alleged that he had sent to Messrs. Kemp & Co. (defendant No. 1) at Bombay a sum of Rs. 300 to pay for goods [44] which he ordered from that firm. Kemp & Co., however, informed him that they could not supply the goods, whereupon the plaintiff telegraphed to them requesting them to pay the money to the second defendant, provided he shipped the goods to Karwar. The goods did not arrive, and the plaintiff brought this suit against Kemp & Co. (defendant No. 1), because they had paid the money to the second defendant before the goods were shipped, and against the second defendant because he had not shipped the goods, although he had received the money.

The plaintiff filed this suit in the Court at Karwar.

The second defendant pleaded (*inter alia*) that the Court had no jurisdiction. The Court, however, held that Karwar was the place where the

* Application under Extraordinary Jurisdiction, No. 169 of 1892.

performance of the contract was to be completed, and that, therefore, the plaintiff's cause of action arose within its jurisdiction. The claim was awarded against defendant No. 2 only, defendant No. 1 being held not liable.

In coming to the above conclusion the Subordinate Judge relied upon (1) a telegram which plaintiff had sent to defendant No. 1 (Kemp & Co.) and which ran as follows :—" Otherwise ply Dadabhai Dajibhai Baria, provided he ships goods ;" and also upon (2) the evidence given by Mr. Tate, the accountant of defendant No. 1 (Kemp & Co.), " that the plaintiff's telegram was shown to defendant No. 2 and the contents thereof made known to him, that the money was paid to defendant No. 2 under a contract that he should ship the goods required by the plaintiff to Karwar, that it was paid for no other purpose, that defendant No. 2 promised to send the goods, and that on that condition the money was paid to him."

Against the decree the second defendant applied to the High Court on the ground that the Court at Karwar had no jurisdiction. He obtained a rule *nisi* to set aside the decree.

Manekshah J. Taleyarkhan, for the Applicant (Defendant No. 2) :— The lower Court erred in holding that the plaintiff's cause of action arose at Karwar. When the defendant No. 1 (Messrs. Kemp & Co.) paid the money to defendant No. 2 at Bombay [45] under the plaintiff's instructions, defendant No. 1 acted as the plaintiff's agent, and the distinct understanding then was that the goods were to be shipped at Bombay. These circumstances show that the contract was entered into and was to be performed at Bombay. The cause of action, therefore, arose at Bombay, and that being so the Court at Karwar had no jurisdiction to entertain the suit.

Sham Rao Vitthal, for the Opponent, *contra*.

Sargent, C. J :—The Subordinate Judge has held that Karwar was the place where the contract was to be performed by the second defendant. If that had been so, the cause of action would have been at Karwar and the Subordinate Judge would have had jurisdiction. But it is plain from the telegram which plaintiff sent to Kemp & Co., and from the evidence of Mr. Tate that the understanding on which the money was paid to the second defendant, and which is the agreement upon which the plaintiff is suing, was that he would ship goods consigned to the plaintiff at Karwar. The contract, therefore, between the second defendant and Kemp & Co., acting on behalf of the plaintiff, was both entered into and intended to be performed in Bombay. The cause of action was, therefore, in Bombay, and the Subordinate Judge had no jurisdiction to try the case against the second defendant.

We must make the rule absolute, and reverse the decree with costs throughout.

Rule made absolute.

[46] APPELLATE CIVIL.

. The 13th December, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR JUSTICE BAYLEY.

Aba bin Sadoba and another.....(Original Defendants) Applicants

versus

Parvatrao bin Ganpatrao.....(Original Plaintiff) Opponent.

Mamlatdars' Act (Bombay Act III of 1876), Sec. 4 (1), Cl. 2—Suit for disturbance of possession—Possession by tenant—Physical possession—Jurisdiction.

There must be physical possession to enable an aggrieved person to invoke the Mamlatdar's assistance in a case falling under the second clause of section 4 of the Mamlatdars' Act (Bombay Act III of 1876)

A person who is in possession through his tenant cannot sue for an injunction or disturbance of possession under the Act.

Desai Malabhai v. Keshavbhai, 1. L. R., 12 Bom., 419, approved and followed.

THIS was an application under the extraordinary jurisdiction of the High Court, (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Sahib Rangnath Narayan, Mamlatdar of the taluka of Kopergaon in the Ahmednagar District.

The plaintiff by his mukhtyar Shankar Vaman Kulkarni brought a summary suit under the Mamlatdars' Act (Bombay Act [47] III of 1876) against the defendants for an injunction directing the defendants not to obstruct the plaintiff's possession of the lands in dispute. It was stated in the plaint that the plaintiff was in possession of the lands through his tenant.

The Mamlatdar passed a decree for the plaintiff as prayed for.

The defendants applied to the High Court and obtained a rule nisi to set aside the order.

Gangaram B. Rele, for the Applicants:—The opponent (plaintiff) being in possession through his tenant, no obstruction was caused to him. In a suit for injunction under the Mamlatdars' Act the person in actual possession must bring the suit. The obstruction must be to physical possession and not constructive possession as that of a landlord. The present suit being brought by the landlord, the Mamlatdar had no jurisdiction to entertain it—*Desai Malabhai v. Keshavbhai*, 1. L. R., 12 Bom., 419.

* Application under Extraordinary Jurisdiction, No. 150 of 1892.

(f) Section 4 of the Mamlatdars' Act (Bombay Act III of 1876):—

(1) Every mamlatdar shall preside over a Court, which shall be called a Mamlatdar's Court, and which shall have powers within such territorial limits as may from time to time be fixed by the Governor in Council to give immediate possession of lands, premises, trees, crops or fisheries, or of any profits of the same, or to restore the use of water from wells, tanks, canals or water-courses to any person who shall have been dispossessed or deprived thereof otherwise than by due course of law, or who shall have become entitled to the possession or restoration thereof by reason of the determination of any tenancy, or other right of any other person in respect thereof.

(2) The said Court shall have also power within the said limits when any person is disturbed or obstructed, or when an attempt has been made to disturb or obstruct any person in the possession of any lands, premises, crops, trees or fisheries, or in the use of water from any well, tank, canal or water-course, or of the use of roads or customary ways to fields, to issue an injunction to the person causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction.

Mahadev Chimnaji Apte for the Opponent.

Sargent, C. J. :—The decision in *Desai Malabhai v. Keshavbhai*, I. L. R., 12 Bom., 419, in which we concur, shows that there must be physical possession to enable an aggrieved person to invoke the Mamlatdar's assistance in a case falling under the second clause of section 4 of the Mamlatdars' Act, and, therefore, that the plaintiff, who was only in possession by his tenant Gangaram, could not sue in the present case.

We must, therefore, make the rule absolute and reverse the decree of the Mamlatdar. Applicants to have their costs of this application.

Decree reversed.

[48] APPELLATE CIVIL.

The 23rd December, 1892.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Virchand Lalchand.....(Original Plaintiff) Appellant

versus

Kumaji and another.....(Original Defendants) Respondents.*

Vendor and purchaser—Unpaid purchase-money, suit by vendor to recover—

Evidence—Registration of bonds given for purchase-money—Limitation

—Limitation Act (XV of 1877), Sch. II, Art. 132.

The defendants purchased land from the plaintiff, and gave bonds for the purchase-money. These bonds were not registered and were, therefore, not admissible in evidence.

Held, that the plaintiff, as vendor, was under no necessity to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money.

Unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it falls under article 132 †, Schedule II of the Limitation Act (XV of 1877).

SECOND APPEAL from the decision of Dr. A. D. Pollen, District Judge of Poona.

The plaintiff in execution of a decree bought certain land belonging to the defendants and entered into possession. He subsequently agreed to resell it to the defendants for Rs. 240. The defendants accordingly executed to him six instalment bonds for Rs. 40 each, and retook possession of the land. The bonds contained a condition that, if default was made in any instalment, the land should revert to the plaintiff. The defendants made default, and in 1885 the plaintiff sued (No. 239 of 1885) to recover the land, on the ground of the breach of the conditions of the sale. In that suit he failed, as the bonds were held to be inadmissible in evidence for want of registration. The High Court, however, in second appeal, allowed him to withdraw the suit and to bring a fresh suit for the unpaid purchase-money. The plaintiff accordingly now sued to recover the said purchase-money. He prayed, in the alternative, that the land should be restored to him.

The defendants pleaded that the present suit was barred by the previous suit and by limitation.

* Second Appeal No. 860 of 1891.

† [Art. 132 :—

Description of suit.

Period of limitation.

Time from which period begins to run.

To enforce payment of money charged upon immoveable property.

Twelve years...

When the money sued for becomes [due.]

[49] The Subordinate Judge dismissed the suit. He held that the claim for possession could not be made, inasmuch as the permission given to the plaintiff by the High Court was only to sue for the unpaid purchase-money, and that in other respects the present suit, although brought within twelve years of the date of sale, was barred by limitation under articles 66, 111, 115 of Schedule II of the Limitation Act (XV of 1877), and by section 72 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the defendants being agriculturists.

On appeal, the District Judge confirmed the decree of the lower Court. In giving judgment he said :—

"The lands originally belonged to defendants, but had been purchased by plaintiff at a Court sale. The bonds contained a condition that, if default was made of any instalment, the land should revert to plaintiff. He alleged that default had been made, and he instituted a suit, No. 239 of 1885, to recover the lands. Technically the suit was one to enforce reconveyance of the lands to him for breach of conditions of the sale. The lower Court and the first appellate Court held that the bonds containing the conditions were inadmissible in evidence for want of registration, and rejected the claim. In second appeal the High Court allowed the plaintiff to withdraw his suit and both appeals, with permission to bring a fresh suit for the unpaid purchase-money. The only suit, therefore, that he can now bring is one for the unpaid purchase-money. Therefore, his present alternative claim for possession of the land, which is, in effect, a renewal of his previous suit, is not maintainable: and, if it were maintainable, the same question of registration would arise again. The claim for the unpaid purchase-money is admittedly made more than six years after the alleged default; and it is, therefore, time-barred, if article 111 of the Limitation Schedule be held to apply. This is the only article that, in my opinion, applies to the case. It is argued that article 132 might apply. Plaintiff might indeed urge, on a fair construction of the bonds, that they gave a special charge upon the land for the purchase-money; but here again the question of registration would come in, and that point has been virtually decided by the previous litigation, and cannot be re-opened."

[50] *Mahadeo Chimnaji Apte*, for the Appellant: We seek to recover the unpaid purchase-money from the land itself. Unpaid purchase-money being a charge upon the property, the claim to recover it is governed by article 132, Schedule II of the Limitation Act (XV of 1877) and not by article 111 of the same schedule, which would have applied if we had sought to make the respondents personally liable.

We do not rely upon the bonds for the recovery of the money. It is the charge upon the property that we seek to enforce.

There was no appearance for the Respondents.

Sargent, C. J. :—The vendor was under no necessity, as the District Judge would appear to think, to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money. It is a well-established rule of an English Court of Equity, and which is equally applicable to the circumstances of this country, that the unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it would, therefore, fall under article 132 of the Limitation Act (XV of 1877).

The present suit, which the Subordinate Judge has found was within twelve years of the defendants going into possession, is, therefore, in time, and the decree must be reversed, and the case sent back for disposal having regard to the above remarks. Costs to follow the result.

Decree reversed

NOTES.

[This was followed in (1899) 21 All., 454; (1898) 22 Bom., 846; (1906) 9 O. C., 284, but not in (1897) 21 Mad., 141.]

[51] APPELLATE CIVIL.

The 23rd December, 1892.

PRESENT :

MR. JUSTICE TELANG AND MR. JUSTICE FULTON.

Chinto.....(Original Plaintiff) Appellant

versus

Janki and others.....(Original Defendants) Respondents.*

Adverse possession—Mortgage—Mortgagee in possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when good also as against the mortgagor—Evidence—Burden of proof—

Limitation Act (XV of 1877), Sch. II, Art. 144.

Land was mortgaged with possession to A, the father-in-law of defendant No. 1, in 1828. In 1856 A was ousted from possession by B, a trespasser (defendant No. 2), who subsequently held the land and dealt with it as his own for forty years. The mortgagor sued both A and B for redemption. In appeal, it was contended by B that his possession had been adverse not merely to A (the mortgagee), but also to the plaintiff (the mortgagor), and that the suit was barred by limitation. The plaintiff contended that B's possession was not adverse to him, because he as mortgagor had no right to possession during the term of the mortgage.

Held, that the suit fell under article 144 of Schedule 2 of the Limitation Act (XV of 1877), and that it lay upon B to prove that his possession for twelve years prior to the suit was adverse to the plaintiff (the mortgagor). There may be a possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. In such a case a suit by the mortgagor, or those claiming under him, will not be barred, although one by the mortgagee may be. The case was remanded for a finding on the question of when B's possession became adverse to the plaintiff.

SECOND APPEAL from the decision of J. FitzMaurice, Acting District Judge of Ratnagiri, in Appeal No. 204 of 1889.

Suit for redemption. In 1828 the land in dispute was mortgaged with possession by plaintiff's father to one Pundlik, the father-in-law of the first defendant. The mortgagee remained in possession till 1856, when he was ousted by defendant No. 2 and his brother. In 1867 defendant No. 2 mortgaged the land to defendants Nos. 3 to 6. In 1869 defendant No. 2 got the land entered in his name in the revenue records. In 1887 the revenue authorities entered the land in the names of both plaintiff and defendant No. 2.

In 1888 the present suit was filed for redemption of the land in question. The plaintiff alleged that the mortgagee Pundlik had assigned his interest to defendant No. 2, who in his turn [52] had sub-mortgaged the property to defendants Nos. 3—6. The suit was dismissed by the Court of First Instance, on the ground that the mortgage sought to be redeemed was not proved.

On appeal, the District Judge found that the mortgage was proved. He however, rejected the plaintiff's claim, holding that the sub-mortgage to defendant No. 2 was not proved, but that defendant No. 2 had been in possession and had dealt with the land as his own for nearly forty years. The decree of the first Court dismissing the suit was, therefore, confirmed.

* Second Appeal, No. 215 of 1891.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ganesh Krishna Deshmukh, for Appellant:—The lower Court has not recorded a distinct finding that the suit is barred by limitation. But assuming that to be the effect of the conclusion to which the Judge has come, then I contend that the suit is not time-barred. The defendant No. 2 may have held adversely to the mortgagee, but such adverse possession does not and cannot affect the mortgagor during the continuance of the mortgage term. Until the term is expired, the mortgagor is not entitled to possession. Till then he has no cause of action. The trespasser can only acquire such estate as the mortgagee possessed. His adverse possession cannot curtail the period of sixty years prescribed for a redemption suit—*Vithoba v. Gangaram*, 12 Bom. H. C. Rep., 180, (A. C. J.). So, too, in the case of a lease, it has been held that the lessor's title is not affected by the possession of a trespasser during the period of the lease—*Sharat Sundari Dalua v. Bhobo Pershad Khan*, 1. L. R., 13 Cal., 101. In *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*, 1. L. R., 4 Cal., 327, Mr. Justice MARKBY explains what is meant by adverse possession. Unless the true owner has a right to immediate possession, the possession of a stranger cannot become adverse to him, nor can limitation begin to run against him. But assuming the article 144 of the Limitation Act (XV of 1877) applies, it lies upon the defendant to show when his adverse possession commenced. This has not been shown in the present case.

[53] *Daji Ahaji Khare*, for Respondent:—The principle laid down in *Vithoba v. Gangaram*, 12 Bom. H. C. Rep., 180 (A. C. J.), is no longer good law. It is dissented from, and disapproved by the Madras High Court in the case of *Ammu v. Ramakishna*, 1. L. R., 2 Mad., 226. It is, moreover, inconsistent with a recent ruling of this Court in *Putappa v. Timmaji*, 1. L. R., 14 Bom., 176. That case shows that the possession of a trespassor can be adverse to the mortgagor as well as to the mortgagee. In the present case it is found by the lower Court that defendant No. 2 and his brother have held and dealt with the property in dispute as owners for nearly forty years. During that period their possession has been clearly adverse to the mortgagor. The suit is, therefore, barred by limitation.

Fulton, J.:—The District Judge has found that in 1828 the plaintiff mortgaged the land in dispute to Pundlik, from whom the defendant No. 1 derives her title. He has also found that for the last forty years it has been in the possession of defendant No. 2 and his brother, who have mortgaged it to defendants No. 3 to 6.

On these facts, holding the allegation that defendant No. 2 was the sub-mortgagee of defendant No. 1 not to be proved, he rejected the claim. He does not expressly state that he considers the claim time-barred, but finding that the sub-mortgage to No. 2 was not proved, and apparently considering it to be the sole ground on which the plaintiff based his claim against him, he dismissed the suit. Both Courts seem to have avoided finding on the question of limitation, which was not raised in the issues framed in the District Court, and they decided against the plaintiff merely because he had failed to prove the existence of the sub-mortgage. This, however, was, in my opinion, too narrow a ground to proceed on, for, remembering the want of accuracy with which plaints are often drawn up, I think that it should have been held that, in case of failure to prove the sub-mortgage, the plaintiff intended to sue defendants Nos. 2 to 6 as trespassers relying on his own title.

The question then directly arises whether the claim against defendants Nos. 2 to 6 is time-barred. In argument it was, I think, [54] not disputed

that article 144 of Schedule II of the Limitation Act (XV of 1877) is the one to be applied, but on behalf of the plaintiff it was contended that, although the second defendant and those claiming under him had held for more than twelve years, their possession was not adverse to the plaintiff, who was himself not entitled to possession without redeeming the property from defendant No. 1. The case of *Vithoba v. Gangaram*, 12 Bom. H. C. Rep., 180 (A. C. J.), is an authority for holding that, in the circumstances described, the possession of a trespasser though adverse to the mortgagee is not adverse to the mortgagor. In that case the Court remarked that it was difficult to understand how there could be any trespass on the mortgagor's possession so long as he had only the equitable estate. But this view has been dissented from in the case of *Ammu v. Ramakishan*, 1 L. R., 2 Mad, 226, in which it has been held that the rights of the mortgagor are liable to invasion equally with those of the mortgagee. Again, in *Puttappa v. Timmaji*, L. R., 14 Bom., 176, it was held that there can be an invasion of the rights of the mortgagor of such a nature as to render the possession of a trespasser on the property adverse to him. But I think that although the possession of a trespasser may undoubtedly be adverse to the mortgagor, the burden of proving when it became so rests on the former. *Prima facie*, by his act of possession he merely ousts the mortgagee who is entitled to hold the property. Such ouster unaccompanied by any further act of aggression on the mortgagor's rights cannot give any cause of action to the latter. During the continuance of the mortgage the mortgagor cannot sue to recover possession of the land. In the case of *Scott v. Newington*, 1 Moo. and R., 253, TINDAL, C. J., held that where the pledgee of certain goods had, in his turn, pledged them, and they had been found ultimately in the hand of a stranger, the original pledgor was entitled to recover possession, on the ground that the owner's right revived because the person having the lien had abused it by pledging the goods. But I do not think similar reasoning will apply to land mortgages in India, or that it can be held that the mere fact of a mortgagee's allowing the mortgaged property to pass into the hands of a trespasser revives the mortgagor's right to possession. In the [55] language of section 58 of the Transfer of Property Act, he has transferred to the mortgagee an interest which comprises the right to possession until redemption, and he cannot sue to recover what does not belong to him. Consequently I agree with the view expressed in *Vithoba v. Gangaram* in so far as it is held that the possession of a trespasser is not necessarily adverse to the mortgagor. In *Womesh Chunder Goopto v. Raj Narain Roy*, 10 Cal. W. R., 15 Civ. Rul., the Calcutta High Court (PEACOCK, C. J., and JACKSON, J.) held that a zemindar was not barred by the adverse possession of a trespasser on his land during the period of the lease, and the decision was followed in *Sharat Sundari Dabha v. Bhoob Pershad Khan*, 1 L. R., 13 Cal., 101. Similarly, in the case of a mortgage, I think it is clear that the mere fact of possession by a stranger is not necessarily an invasion of the mortgagor's right. It may, however, become so, but it is for the defendant to show when it became adverse. In the Madras case above referred to it will be observed that the defendant had many years before got her name entered in the Government records and had since then purported to hold directly from the Government. In the present case the second defendant alleges that proceedings have been taken to remove plaintiff's name from the survey records, but there has been no finding as to when they took place, whether they were successful, and whether the plaintiff had any notice of them. Excepting this statement of proceedings to remove the plaintiff's name it does not appear in what way the second defendant's possession was adverse to him. It is true that he now states that he holds not as mortgagee but as owner, but it is for him to show when he assumed that attitude. The

rule which requires a plaintiff who has been dispossessed to prove that he has been in possession within the period of limitation, does not apply to a case of this sort in which the plaintiff's mortgagee is found to have been in possession in 1856 and the plaintiff himself was not entitled to immediate possession.

Under the circumstances, I think the following issues should be sent to the District Judge for finding on the evidence on record:—

[56] (1) When did the defendant No. 2's possession become adverse to the plaintiff?

(2) Has plaintiff proved his title to the land as against defendant No. 2 and his assignees?

The findings should be returned within two months.

Telang, J.:—In this case I have, on the whole, come to the conclusion, that looking to the issues settled in the Court of appeal, and also to the judgment of the Subordinate Judge, [which shows that *Vithoba v. Gangaram*, 12 Bom. H. C. Rep., 180 (A. C. J.), was relied on before him] it is open to the appellant to raise the main question which was argued before us on his behalf. That question is whether, when a mortgage is effected, and the mortgagee is put in possession, a stranger to the mortgage can by twelve years' possession obtain a title against the mortgagor. In *Vithoba v. Gangaram*, 12 Bom. H. C. Rep., 180 (A. C. J.), it appears to have been broadly laid down that he cannot do so. In *Ammu v. Kamakishan*, 1 L. R., 2 Mad., 226, on the other hand, the High Court of Madras has held that such a possession is capable of ripening into a title even as against the mortgagor by virtue of the Limitation Act. And in *Puttappa v. Tammaji*, 1 L. R., 14 Bom., 176, this Court has pointed out that *Cholmondeley v. Clinton*, 2 J. and W., p. 1, to which I referred during the argument, has laid down the doctrine inconsistent with the broad proposition enunciated in *Vithoba v. Gangaram*, 12 Bom. H. C. Rep., 180 (A. C. J.), that there may be a possession adverse to an equity of redemption during the currency of a mortgage.

It seems to me that the question is one not capable of an answer in the abstract without reference to the circumstances of each case. It is well established in this Court, that there may be a possession adverse to the interest of a mortgagee, which is nevertheless not adverse to the interest of the mortgagor. The case of *Purmananddas v. Jamnabai*, 1 L. R., 10 Bom., 49, affords an illustration of that kind. In such a case a suit for possession by the mortgagor, or those claiming under him, will not be barred, although one by the mortgagee may be. In the present case, however, we have not such an admission of the title of the mortgagor by the party in possession, as the Court had to deal [57] with it in that case. Here, on the findings of the Court below, we must take it that there was a mortgage by the plaintiff purporting to be one with possession in 1828; that the mortgagee was in possession under such mortgage in 1856, but that the defendants have been in possession of the property "as their own for some forty years past" without having ever "attorned to the plaintiff in any way, or made any admission of his right." And the question arises, what is the effect of the law of limitation in such a case? In this aspect of it, it is obviously not a suit coming within article 148 of the Schedule to the Limitation Act, as was faintly suggested in argument for the appellant. The case must fall within the purview of article 144. And according to the decision of the Privy Council, in cases falling within that article, it lies on the defendant to prove that his adverse possession commenced more than twelve years prior to the institution of the suit. Now, no doubt, a person who by trespass or without title is in possession of property as his own may, in one sense, be said to hold a possession adverse to every one including the true owner. For, as

said in quaint language in an old English case, "wrong is unlimited, and ravens all that can be gotten" [see 2 Smith's Leading Cases (9th Ed.), p. 736]. But, on the other hand, Mr. Justice MARKBY's definition of adverse possession does not apply to a possession of this character, if the true owner is not at the time himself entitled to possession. The words "immediately entitled to possession," which form part of that definition, are in such a case inapplicable. I think, too, on the whole, that Mr. J. W. Smith's definition also is not satisfied by such a possession, as the "incompatibility" required by it does not necessarily exist in such a case. And this construction of the phrase "adverse possession" would be in harmony with the general principle that *contra non valentem agere nulla currit prescriptio*. Compare also *Dalton v. Angus*, 6 Ap. Ca. at p. 818, per Lord BLACKBURN.

The question then resolves itself into this. Has a mortgagor a right to possession of mortgaged property, if the mortgagee, having been placed in possession, should thereafter lose such possession by trespass or otherwise on the part of a stranger? [58] By English law, apparently, the mortgagor would have no such right. In Cole on Ejectment it is said that ejectment against a stranger "cannot be maintained in the name of the mortgagor, except, perhaps, under circumstances similar to those in which the action might be maintained against the mortgagee himself,"—that is, apart from special cases, except after payment of the mortgage money. And although, no doubt, the rule there laid down is due to the fact that the legal title is under English law conveyed to the mortgagee, still it would seem that the same rule ought to be applied in India also. For the mortgagor, having once put the mortgagee in possession, ordinarily has no right to possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession, though he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up the *just title*. 2 Smith's Leading Cases, 602—3, Woodfall's Landlord and Tenant, 885.

In England, before the Act of William IV, the rule in the somewhat analogous case of limitation against a landlord was, as stated by the Real Property Commissioners quoted in Smith's Leading Cases, p. 643, that "in the case of a lease adverse possession so as to bar the reversioner does not commence till the expiration of the term where rent is reserved on a lease." The Commissioners recommended a change, and the statute enacted one to the extent that where rent was wrongfully received by another, and the landlord received none at all, limitation should run against the landlord from the time of such wrongful receipt. But this would rest on the principle which the Commissioners indicate, that refusal to pay rent to the rightful owner coupled with a payment to another is a virtual dispossession of the rightful owner. There would not, however, be necessarily any such "virtual dispossession" of a mortgagor, where the mortgagee having taken possession, a trespasser subsequently entered upon the mortgaged property.

The result of these considerations in the present case is that it lies upon the defendant before he can succeed to make out that [59] his possession for twelve years prior to the suit was adverse to the plaintiff. The plaintiff says it was not adverse, because he had no right to possession during all these years. In order to decide on that contention it is necessary to have the finding of the Court below on the various questions of fact involved in it, and for that purpose I concur in sending down to that Court the issues framed by Mr. Justice FULTON, which are wide enough to embrace all considerations of fact relevant to the questions of law raised in the case.

Case remanded.

NOTES*

[Adverse possession against the mortgagee in possession does not necessarily bar the mortgagor:—(1904) 27 All., 395; (1902) 25 Mad., 507; (1907) 30 All., 119; (1903) 5 Bom. L. R., 186; (1904) 6 Bom. L. R., 638; (1903) 16 C. P. L. R., 154; (1897) 21 Mad., 153; (1899) 26 Cal., 460; (1902) 27 Bom., 43; (1894) 19 Bom., 138; (1908) 12 O. C., 45. (1913) 15 M. L. T., 112; 26 M. L. J., 140 F. B.]

[18 Bom 59]

APPELLATE CIVIL.

The 10th January, 1893.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Lallubhai Vajeram and another.....(Original Plaintiffs
and Petitioners) Appellants

versus

Bai Magangavri.....(Original Defendant and Opponent) Respondent.*

*Practice—Procedure—Civil Procedure Code (XIV of 1882), Secs. 100
and 647—Dismissal of suit for default—Application to restore
suit—Notice of application—Service of Notice—Negligence.—
Second application for issue of notice—Costs.*

A suit having been dismissed for plaintiff's default, he applied for the restoration of the suit to the file, and a notice was issued to the defendant to show cause why the suit should not be restored. The notice was returned unserved, owing to plaintiff's neglect to point out the defendant to the serving officer. The plaintiff having applied for a fresh notice, the Subordinate Judge rejected the application.

Held, that the Subordinate Judge had no power to reject the plaintiff's application for a fresh notice. Section 100 of the Civil Procedure Code (XIV of 1882), which by section 647 is made applicable to such a proceeding, only enabled him to order a fresh notice to issue, and, if he thought proper, to order plaintiff to pay the costs occasioned by the necessary postponement.

APPEAL from an order passed by the First Class Subordinate Judge of Surat.

The plaintiff's suit having been dismissed for default, the plaintiff applied to the Subordinate Judge to set aside the order of dismissal. A notice was issued to the defendant to show cause why the suit should not be restored to the file, but it was returned unserved owing to plaintiff's neglect to point out the defendant to the bailiff. The plaintiff then applied for the issue of a fresh [60] notice, stating that he had been absent in Bombay, and, therefore, had been unable to accompany the bailiff when he went to serve the previous notice on the defendant.

The Subordinate Judge, however, rejected the application, on the ground that no sufficient excuse had been shown for the plaintiff's neglect.

The plaintiff appealed

Govardhanram M. Tripathi, for the Appellants (plaintiffs):—The lower Court was bound to issue a fresh notice. Under section 100 of the Civil Procedure Code (XIV of 1882), which is made applicable to proceedings of the present nature by section 647, the utmost that the Court could do was to make the plaintiff pay the costs of the application, but it had no authority to reject it. The issue of a fresh notice is merely a formal matter.

Motilal Muquttlal Munshi, for the Respondent (defendant). It was the plaintiff's duty to point out the defendant to the bailiff. The Court found him

* Appeal No. 35 of 1892.

guilty of negligence in not doing so. The Court is not bound under these circumstances to continue to issue fresh notices.

Sargent, C. J. :—The Subordinate Judge had no power to dispose of the plaintiff's application on the 18th June, because notice had not been served on defendant owing to plaintiff's neglect to point him out to the serving officer. Section 100 of the Code of Civil Procedure (XIV of 1882), which by section 647 of the Civil Procedure Code is made applicable to a proceeding of this nature, only enabled him to order a fresh notice to issue, and, if he thought proper, to order plaintiff to pay the costs occasioned by the necessary postponement. We must, therefore, discharge the order, and direct the Subordinate Judge to proceed according to law. Costs of this appeal to be costs in the plaintiff's application.

Order discharged.

NOTES.

[See also (1910) 10 I.C., 705 (Nagpur).]

[61] APPELLATE CIVIL.

The 3rd August, 1882.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Krishna Velji Marwadi.....(Original Opponent) Applicant
versus

Bhau Mansaram.....(Original Petitioner) Opponent. * .

*Civil Procedure Code (XIV of 1882), Secs. 25 † and 647—Decree—Execution—
Transfer of execution proceedings from one Court to another—Small Cause
suit—Act VI of 1892, Sec. 4—Rateable contribution—Civil Procedure
Code (XIV of 1882), Secs. 295 and 223 (d)—Discretion of
District Judge—Extraordinary jurisdiction of High Court.*

A District Judge has power, under section 25 of the Civil Procedure Code (XIV of 1882), or under that section read with section 647, to transfer execution proceedings in a Small

* Application No. 217 of 1892 under Extraordinary Jurisdiction.

† Section 25, Civil Procedure Code (XIV of 1882).—

The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion without giving such notice, withdraw any suit whether pending in a Court of First Instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such Subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter.

For the purpose of this section the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes, shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Cause Court to the Court of a Subordinate Judge. The ruling in the case of *Balaji Ranchoddas*, I. L. R., 5 Bom., 680, that these sections apply to execution proceedings in Small Cause Courts, is not affected by the explanation to section 4 of Act VI of 1892.

Execution proceedings under a decree against A in a Small Cause Court were transferred by a District Judge to a Subordinate Judge's Court where execution was proceeding against A under another decree, and it was objected that, as by the concluding paragraph of section 25 of the Civil Procedure Code (XIV of 1882), the attachments under the two decrees would be in different Courts, section 295 of the Code would not apply, and rateable distribution could not be granted.

Held, that the last paragraph of section 25 did not convert the Subordinate Judge's Court into a Small Cause Court, but only provided for the trial of the suit, which had been transferred, being conducted by the Subordinate Judge's Court as a Small Cause suit.

[62] The High Court will not in its extraordinary jurisdiction interfere, except under circumstances of a very special nature, with the discretion of a Judge who has transferred execution proceedings under a decree from one Subordinate Court to another.

Quere—whether a Subordinate Judge under clause (d) of section 223 of the Civil Procedure Code (XIV of 1882), can transfer a decree for execution to a Court of Small Causes when the property attached is situate within the local jurisdiction of the Subordinate Judge.

THIS was an application under the extraordinary jurisdiction, (section 622 of the Civil Procedure Code, Act XIV of 1882), against an order passed by W. H. Crowe, District Judge of Poona.

Krishna Velji Marwadi, the applicant, obtained a decree against one Gumna Damber in the Court of Small Causes at Poona, and in execution attached his moveable property. In the meanwhile the opponent, Bhuu Mansaram, who had obtained a decree in the High Court at Bombay, on its Original Side, for Rs. 13,446-14-6 against the said Gumna Damber and one Moti Rasa, got the decree of that Court transferred to the Court of the First Class Subordinate Judge of Poona for execution, and levied an attachment on the property, which, as above stated, was already attached in execution of the Small Cause Court's decree. The property having been thus attached under two decrees passed by two different Courts, the opponent (Bhuu Mansaram), with the object of sharing in the sale-proceeds of the property, applied to the District Judge to transfer the execution proceedings of the Small Cause Court to the First Class Subordinate Judge, and asked that an order might be passed that he should share rateably in the proceeds of the execution sale. The District Judge in granting the application made the following remarks:—

"Sections 25 and 647 of the Code of Civil Procedure empower this Court to transfer such a *darkhast*. By Act VI of 1892, section 4, section 647 is declared not to apply to applications for execution which are proceedings in suits. The course adopted by the applicant (opponent in the High Court) is that authorised by the ruling in *Muttakuri v. Muttayyar*, I. L. R., 6 Mad., 357, and I can see no objection to complying with the application."

[63] The applicant then applied to the High Court under the extraordinary jurisdiction to set aside this order, contending (1) that it was passed without jurisdiction; (2) that it was contrary to the spirit and purpose of section 25 of the Civil Procedure Code.

A rule *nisi* was granted calling on the opponent to show cause why the order should not be set aside.

Mahadeo Chimnaji Apté appeared for the opponent to show cause:—We sought for the transfer of the Small Cause Court's decree to that of the Subordinate Judge, to which our decree had been already transferred, for the purpose of obtaining a share of the proceeds of the sale. Section 647 of the Civil Procedure Code read together with section 25 empowers the District

Judge to order the transfer—*Balaji Ranchoddas*, I. L. R., 5 Bom., 680; *Muttalgi v. Muttalgi*, I. L. R., 6 Mad., 357. The property attached being within the jurisdiction of the Subordinate Judge, our decree could not be transferred to the Small Cause Court.

Ghanasham N. Nadkarni, for the Applicant, in support of the rule :—Section 25 of the Civil Procedure Code relates to suits and not to execution proceedings. The Judge had no authority to transfer the execution of the Small Cause Court decree to the Subordinate Judge. Even supposing that section 647 read along with section 25 does empower the Judge to order such a transfer, still as the nature of the decree of the Small Cause Court cannot be altered, the Court of the Subordinate Judge will be the Court of Small Causes with respect to that decree. The proceedings under the two decrees cannot coalesce merely because the Judge is the same, and that being so, section 295 of the Civil Procedure Code does not apply—*Sankappa v. Basappa*, P. J., for 1880, p. 106; *Bhaqvan Dayalji v. Balu*, I. L. R., 8 Bom., 230, *Dharamdas v. Vaman Govind*, I. L. R., 9 Bom., 237. The ruling in *Balaji Ranchoddas*, I. L. R., 5 Bom., 680, no longer applies, because section 4 of Act VI of 1892 enacts that section 647 of the Civil Procedure Code does not apply to applications for the execution of decrees.

Sargent, C. J. :—We think that the District Judge had jurisdiction to transfer the execution proceedings in the Small Cause [64] Court to the Subordinate Court. In *Balaji Ranchoddas*, I. L. R., 5 Bom., 680, it was held that section 25, Civil Procedure Code, read with section 647 applied to such proceedings, and we do not think that ruling is in any way affected by the explanation to section 4 of Act VI of 1892. But in any case either section 25 alone or section 25 read with section 647 would give the District Court the power of transfer.

It was said, however, that when the execution proceedings in the Small Cause Court had been transferred, the attachment would then be in two Courts by virtue of the concluding paragraph in section 25, and section 295 would, therefore, not apply. But that paragraph does not convert the Subordinate Judge's Court into a Small Cause Court, but only provides for the trial of the suit being conducted by the Court to which it is transferred as a Small Cause Court suit. The remarks of WEST, J., in *Bhaqvan Dayalji v. Balu*, I. L. R., 8 Bom., 230, where a similar question arose under Act XIV of 1869, are applicable to this case.

As to the propriety of the transfer, the question is one of discretion with the District Court, and the exercise of it could not be impeached under our extraordinary jurisdiction unless the circumstances were of a very special nature. We may, however, remark that here the opponent, who was anxious to share in the proceeds of the sale, could not get his decree transferred to the Small Cause Court for execution, as the property attached was in the local jurisdiction of the Subordinate Judge, and in that case it may well be doubted whether clause (d) of section 223 would enable the Subordinate Judge to transfer the decree; but in any case it would be a matter of discretion with him and in no way compulsory, and it was, therefore, reasonable to transfer the Small Cause Court execution proceedings to the Subordinate Judge's Court in order to do equity between the judgment creditors according to the spirit of the Civil Procedure Code. For these reasons we must refuse the application. Rule discharged with costs.

Rule discharged.

NOTES.

[This was followed in (1897) 22 Bom. 778; see also (1893) 18 Bom., 458; (1894) 19 Bom., 276.]

[66] ORIGINAL CIVIL.

The 19th September, 1893.

PRESENT :

MR. JUSTICE PARSONS.

Virbaiji.....Plaintiff

versus

The Wadia Mills Company.....Defendants.*

Company—Indian Companies Act (VI of 1882), Sec. 134—Winding up—Suit against a company—Stay of proceedings when petition to wind up is pending—High Court Rules No. 10, Clause (r)—Practice—Procedure.

The plaintiff sued the defendant company to recover Rs. 10,000. The claim was not disputed, but shortly after the suit was filed another creditor filed a petition to wind up the company. This petition was pending when the suit came on for hearing, but no order to stay proceedings had been obtained by the defendants, and the plaintiff contended that under the circumstances he was entitled to obtain a decree having regard to the fact that no such order had been made, and that by the rules of the Court such order could only be made in chambers.

Held, on application by the defendants at the hearing, that the proceedings must be stayed. **SHORT** cause. This suit, which was filed on the 19th August 1893, came on for hearing on the 19th September. At that time a petition to wind up the defendant company was pending which had been filed by another creditor on the 19th August 1893. The hearing of the petition to wind up was fixed for the 23rd September. No written statement was filed, and the plaintiff's claim was admitted by the defendants.

Defendants' attorneys on the 8th September 1893, wrote to the attorneys for the plaintiff asking her (the plaintiff) to consent to the suit standing over until the disposal of the petition to wind up had been disposed of, and giving notice that otherwise an application would be made to the Court to stay further proceedings. The plaintiff's attorney declined to consent, on the ground that no order had been made to wind up the company, and stated that the plaintiff would proceed to obtain a decree on the day fixed for hearing.

The suit came for hearing on the 19th September, when

Lang (Acting Advocate-General), for the Defendants, applied that the proceedings should be stayed—Indian Companies Act (VI of 1882), section 134. He admitted that the plaintiff was entitled to her costs of suit up to date, but submitted that the costs should not be increased by any further proceedings in the suit. He referred to section 85 of the English Companies Act (Stat. 25 and 26 [66] Vic., c. 89) ; *In re The London and Suburban Bank*, 19 W. R. , 950 ; *Lindley on Companies* (5th Ed.), pp. 674-676 ; *Buckley on Companies* (5th Ed.), p. 230.

Inverarity, for the Plaintiff :—The plaintiff is entitled to a decree. By the rules of Court (Rule 10, clause r), all applications in company matters must be made in chambers. No application to stay proceedings has been made, and no order to that effect has been obtained. The plaintiff is, therefore, now entitled to proceed and get her decree. The defendants may hereafter apply to have execution stayed.

Parsons, J. :—The application to stay proceedings is now made by the defendants, and under section 134 of the Companies Act (VI of 1882) I have

discretion to make the order. The proceedings must be stayed until the petition to wind up the company is heard and disposed of on the defendants giving the usual undertaking as to damages.

Order to stay proceedings.

Attorney for the Plaintiff:—Mr. Shamrao Pandurang.

Attorneys for the Defendants:—Messrs. Wadia and Gandhi.

[18 Bom. 66]
ORIGINAL CIVIL.

The 18th August, 1893.

PRESENT:

MR. JUSTICE BAYLEY AND MR. JUSTICE STARLING.

Yeshwadabai and Gopikabai, Widows.....(Original Plaintiffs) Appellants
versus
Ramchandra Tukaram.....(Original Defendant) Respondent.*

*Practice—Procedure—Evidence—Landlord and tenant—Terms of
tenancy proved orally although contained in a document—
Compensation for buildings erected by tenant—Estoppel.*

The plaintiffs alleged that in 1866 the defendant's father had let land to their predecessor in title in perpetuity on fazendari tenure for building purposes, subject to a certain rent. They complained that the defendant sought to eject them, and they prayed for a declaration that they were entitled to the land in perpetuity subject only to payment of the yearly rent. In the event of its being held that they were not perpetual tenants, they prayed that the defendant might be ordered to pay them Rs. 7,000, the value of the buildings on the land. The plaintiffs made out a *prima facie* case without showing, or its being shown, that there was any agreement or lease. Before the case had concluded, however, a document was [87] produced which was said to be a counterpart of the agreement of letting made in 1866. It was not registered, and was, therefore, inadmissible in evidence. It was not tendered, but it was shown to the defendant in cross-examination, and he denied that it was a genuine document.

Held, that the plaintiffs, having made out a *prima facie* case without betraying the existence of a written contract relating to the subject-matter of the suit, were not precluded from obtaining a decree even though it afterwards appeared that a written contract had been made. If the defendant intended to rely upon a written contract it was for him to produce it as part of his evidence. In the present case, as the document was not referred to in the plaint, written statement or issues and was not before the Court, the evidence should be looked at to ascertain the terms of the tenancy by which the plaintiffs and their predecessors in title held the property.

Where a landlord had not objected to buildings erected by his tenant for a period of twenty-five years, and during that time had received rent from the tenant,

Held, that even if the Court were not justified in holding that the land had originally been granted for building purposes, the landlord would be precluded from ejecting the tenant without compensation.

SUIT for a declaration that the plaintiffs were entitled to hold certain land situate at Foras Road in Bombay in perpetuity subject only to a certain rent payable to the defendant, and for an injunction restraining the defendant from executing a decree for possession obtained by him in the Small Cause Court.

The plaint stated that in 1866 one Tukaram Moroji, the father of the defendant, let the land in question to one Thucker Tricum Sewji Lowana, in perpetuity, on fazendari tenure for building purposes at an uniform rate of Rs. 12 per kathi per annum; and that it was then agreed that, in the event of Government taking up the said land, the said Thucker Tricum Sewji and his successors or assigns should be entitled to receive the value of any buildings erected by him or them upon the land, and that the said Tukaram Moroji should only be entitled to receive the value of the land.

In pursuance of this agreement, Thucker Tricum Sewji built a house on the land and paid as rent Rs. 102 per annum to Tukaram Moroji.

Thucker Tricum Sewji afterwards became insolvent, and his right, title and interest in the house and land were sold in 1876 to Solomon Aroon Gandel, who continued to pay the said sum of Rs. 102 as rent.

In 1878 Solomon Aroon conveyed the said house and land to Gopal Yeshwant Pednekar, the husband of the plaintiffs, and he [68] continued to pay the said rent each year to the defendant as fazendar.

Gopal Yeshwant rebuilt the house and continued to pay the said rent to the defendant until 1885. He died intestate in February 1887, and the plaintiffs, his widows, paid the defendant the rent for 1886. They also subsequently paid the rent for 1887, 1888, 1889 and 1890.

On the 30th September 1891, the defendant gave notice to the plaintiffs requiring them to give up the land, which he alleged they held as monthly tenants. The plaintiffs declined to do so. The defendant then filed a suit in the Court of Small Causes in Bombay, and on the 5th December 1891, obtained a decree for possession.

The plaintiffs now sued praying for an injunction restraining the defendant from executing the decree of the Small Cause Court, and for a declaration that they were entitled to hold the land in perpetuity, subject only to the payment of the aforesaid yearly rent, and that the defendant was not entitled to eject them so long as the said rent was paid. They prayed that, in the event of its being held that they were not perpetual tenants, the defendant might be ordered to pay them Rs. 7,000, the value of the building standing on the land, &c.

The defendant denied that the plaintiffs were perpetual tenants, and alleged that the rent was payable monthly, but had been often in arrear.

At the hearing a document was produced which was said to be a counterpart of the agreement under which the land was let in 1866 by the defendant's father to the plaintiffs' predecessor (Tricum Sewji). This document, however, was not registered, and was, therefore, inadmissible in evidence. It was not tendered, but in cross-examination it was shown to the defendant, who denied that the mark affixed to it was his father's mark. The document was not made an exhibit in the case.

The lower Court (PARSONS, J.) held that there was no evidence of the perpetual lease alleged by the plaintiffs, and that the defendant had a right to eject the plaintiffs. The plaintiffs had alleged a special agreement. Although there was no evidence of its terms (the document being inadmissible) the fact that this agreement was made [69] precluded the plaintiffs from claiming compensation under the custom of the country. As to this the Court said:—"Had the

plaintiffs been let in on the land without an agreement, or had the land been let to them according to the custom of the country, it might be argued, according to some decided cases, that plaintiffs would be entitled to remove the materials or to compensation, but here there was a special agreement, and we cannot go beyond it. It might have been one for a term of years. Certainly it is not proved that under that agreement plaintiffs have the right to remove the materials, and, therefore, I cannot award them or their value. The value of them is very little. It is not proved that the plaintiffs' husband rebuilt, or that they spent Rs. 1,500 in repairs." The suit was dismissed with costs.

The plaintiffs appealed.

Macpherson and Lowndes, for the Appellants (Plaintiffs): -- They cited *Beni Madhab Banerjee v. Jai Krishna*, 7 Beng. L. R., 152, *Sufdur Ali v. Jao Naram*, 16 Cal. W. R., 161 (Civ. Rul.); *Lalla Gopee Chand v. Liakut Hossein*, 25 *Ibid.*, 211; *Furzuud Ali Khan v. Aka Ali Mahomed*, 3 Cal. L. R., 194; *Prosunno Coomar Chatterjee v. Jagun Nath Bysack*, 10 *Ibid.*, 25; *Crungedhur Shikdar v. Ayimuddin Shah Biswas*, 11 *Ibid.*, 281; s. c., 1 L. R., 8 Cal., 960; *Tranquarda v. Leshapa*, P. J., 1892, p. 382; *Ramsden v. Lyson*, L. R., 1 H. L., 129, at p. 140.

Inverarity and Anderson, for Respondent (Defendant): -- They cited *Juggut Mohunee Lossee v. Dwarka Nath Bysack*, 1 L. R., 8 Cal., 583, *Beni Madhab Banerjee v. Jai Krishna*, 7 Beng. L. R., at p. 158; *Prosunno Coomar Chatterjee v. Jagun Nath Bysack*, 10 Cal. L. R., at p. 30, *Plimmer v. Mayor, &c., of Wellington*, 9 App. Cas., 699.

Cur. adv. vult.

September 2. Bayley, J. :-- The plaint in this suit states that in or about the year 1866 Tukaram Moroji, defendant's father, let to Thucker Tricum Sewji, in perpetuity, on fazendari tenure a piece of land situate at Foras Road, called Arthur Road, leading from Parel to Tardeo, 85 feet in length and 30 in breadth and measuring 8½ kathis, at an uniform rate of Rs. 12 per kathi per annum, and it was agreed that, in the event of Government taking up the land, [70] Tricum Sewji and his successors or assigns should be entitled to receive the value of any house or other buildings erected by him or them thereon, and that Tukaram Moroji should only be entitled to receive the value of the land; that Tricum Sewji, in pursuance of the said agreement, built a house on the land and paid as rent Rs. 102 per year to Tukaram Moroji; that Tricum Sewji having subsequently filed his petition and schedule in the Insolvency Court, the Official Assignee in 1876 sold the insolvent's right, title and interest in the house and ground to one Solomon Aroon Gandel, who thereafter continued to pay annually the said sum of Rs. 102 as the rent for the said ground, that by indenture dated 2nd July 1878, Solomon Aroon Gandel conveyed the property to Gopal Yeshwant, the husband of the plaintiffs, who thereafter paid the aforesaid rent every year to the fazendar, the defendant, that Gopal Yeshwant rebuilt the house and continued to pay the annual rent of Rs. 102 to defendant until 1885; that Gopal Yeshwant died intestate on the 17th February 1887, leaving him surviving the plaintiffs his widow, and that the plaintiffs paid the rent for 1886 to defendant; that in 1887 the defendant demanded payment of the rent from plaintiffs every six months, who accordingly paid it every six months, and in 1888 at defendant's request they paid it to him every two months until the 31st August 1888, after which date defendant sent his rent bills sometimes every month and sometimes every two months until 31st December 1889. In 1890 defendant returned to the former practice and sent a bill for the year's rent, viz., Rs. 102, which plaintiffs paid; that on the 30th September 1891, defendant by his solicitor sent a notice to plaintiffs calling on them to give up possession of the land on the 1st November 1891, and threatening, in default of compliance

with such requisition, that a suit in ejectment would be brought against them, and that in reply thereto the plaintiffs by a letter dated the 29th October 1891, denied that they were monthly tenants, and declined to give up possession of the land.

The plaintiff then stated that the defendant filed a Suit (No. 25011 of 1891) in the Bombay Court of Small Causes against the plaintiffs for possession of the land, and obtained a decree against them on the 5th December 1891, whereby the plaintiffs were ordered to deliver up possession to the defendant within two months from the date of the decree.

[71] The plaintiffs prayed that it might be declared that they are entitled to hold the land in perpetuity, subject only to the payment of the annual rent of Rs. 102; that defendant might be restrained by injunction from executing the decree of the Court of Small Causes in Suit No. 25011 of 1891 until the final determination of this suit; that, in the event of the Court's holding that the plaintiffs are not the permanent tenants of the defendant, he might be decreed to pay to them Rs. 7,000, the present value of the building now standing on the ground, and a further sum of Rs. 3,000, for damages for the defendant's unlawful acts and proceedings taken by him against the plaintiffs, by which the property has deteriorated in value; that the plaintiffs' costs may be provided for, with a prayer for such further or other relief as the circumstances of the case may require.

The defendant by his written statement denied the statements contained in the 1st and 2nd paragraphs of the plaint and the statement as to payment of rent in paragraphs 4 and 5 thereof, and required the plaintiffs to prove the same. He alleged that the rent was always, as a matter of fact, payable monthly, but that the plaintiffs, being the defendant's monthly tenants, frequently got into arrears, and consequently when they did pay, they paid rent for more than one month. He denied that the plaintiffs were entitled to the remedies claimed, and submitted that the suit should be dismissed with costs.

The case came on for hearing before Mr. Justice PARSONS on the 1st August 1892, when after reading the plaint and written statement the following issues were framed :—

1. Whether plaintiffs are entitled to hold the land in suit in perpetuity, subject only to the payment of Rs. 102 annually?
2. Whether after the decision of the Small Cause Court in Suit No. 25011 of 1891 the plaintiffs can maintain this suit?
3. Whether the defendant has a right to eject the plaintiffs?
4. Whether the plaintiffs are entitled to claim Rs. 7,000 or any and what sum for the value of the buildings now on the land?

The claim for damages (i.e., of Rs. 3,000) being abandoned, no issue was raised on it.

5. The general issue.

[72] The judgment and findings were thus recorded by the learned Judge :—

"I find issue 1 in the negative. No evidence of perpetual lease or of right to hold subject to payment of fixed rent. 2 affirmative. 3 affirmative. Plaintiffs being tenants can be ejected, no right to the contrary being proved. 4 Had the plaintiffs been let in on the land without an agreement, or had the land been let to them according to the custom of the country, it might be argued, according to some decided cases, that plaintiffs would be entitled to remove the materials or to compensation; but here there was a special agreement, and we cannot go

beyond it. It might have been here one for a term of years. Certainly it is not proved that under that agreement plaintiffs have the right to remove the materials, and, therefore, I cannot award them or their value. The value of them is very little. It is not proved plaintiffs' husband re-built, or that they spent Rs. 1,500 in repairs. The suit is dismissed with costs."

The plaintiffs have appealed on the ground, amongst others, that the Judge was in error in finding that there was no evidence of a perpetual lease of the premises in question or of a right in the plaintiffs to hold the same subject to the payment of a fixed rent; that, in any event, he should have held that the plaintiffs were entitled either to remove the building erected on the land in question or to compensation therefor; that the decree was contrary to law and equity and to the weight of evidence in the case, and should be reversed with costs, and a decree passed for the plaintiffs for the relief claimed by them.

On the argument of the appeal before us Mr. Macpherson, on behalf of the appellants, contended that the original grant in 1866 not being before the Court, the Court could only collect what were the terms of it from perusing the evidence given at the hearing; that the respondent could not eject the appellants, because they had an absolute title so long as they paid the rent; and that, if he could, they were entitled to compensation, or to have a reasonable time to remove their buildings, and that the case must be dealt with as if the origin of the tenancy was not known. Mr. Anderson, on the other hand, argued that the foundation of the claim was a written document of which by a Judge's order the respondent had been allowed inspection; that on the authority of *Juggut Mohinee Dossee v. Dwarka Nath Bysack*, a case reported in I. L. R., 8 Cal., 582, it was clear that the English law applied, the property in dispute being situated in a Presidency town and not in the Mofussil, and that the decision of the learned Judge was correct, and ought not to be disturbed. The Judge in the Court below found that there was a special agreement, and that he could not go beyond it.

The plaint, however, made no reference whatever to any written agreement, nor did the written statement, and there was no allusion to any such document in the issues. There was nothing said in the evidence, oral or documentary, given on behalf of the appellants as to any written contract or lease having been executed by respondent's father Tukaram Moroji to Tricum Sewji, and the appellants made out a *prima facie* case without showing, or its being shown, that there was any written agreement or lease. When the respondent was afterwards examined in support of his case he said, in cross-examination, that he had no writing of the lease to Tricum, no counterpart; that his father could not write or sign his name, but used to make a mark—the mark of a plough; that he had no paper with him that bears his mark; that the paper then shown to him was not his mark.

There is, however, some document in existence which was alleged to be a counterpart of a Marathi agreement said to be dated 19th November 1866, made between Tukaram Moroji and Tricum Sewji. The respondent had applied and, under a Judge's order, was allowed inspection of it before he filed his written statement, and such document was probably the one shown to him during his cross-examination, the mark on which he said was not his father's mark. Had he admitted that the document was a genuine one, and had he tendered it, it could not have been received in evidence, because, as stated by counsel during argument before us, it had not been registered as required by the Registration Act then in force, the first of which Acts (XVI of 1864) came into force in the Bombay Presidency on the 1st January 1865. We are of opinion that the Judge could not see judicially that such document was in

existence, unless it was produced properly registered. In point of fact, no such document was produced, or even tendered in evidence, during the hearing.

[74] Now it has been long settled in England that, if a plaintiff can establish a *prima facie* case without betraying the existence of a written contract relating to the subject-matter of the action, he cannot be precluded from recovering by defendant subsequently giving evidence that the agreement was reduced into writing; but the defendant, if he means to rely on a written contract, must produce it as part of his evidence, and, in the event of its turning out to be unstamped or insufficiently stamped, he must pay the duty and penalty. In a case decided by the Court of King's Bench in 1827—*Reed v. Deere*, 7 B. & C., 261,—Mr. Justice LITTLEDALE said (p. 266): "If, indeed, a plaintiff gets through his case without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it unless it be duly stamped." In *Sievens v. Pinney*, 8 Taunt., 327, decided by the Court of Common Pleas in 1818, in an action on the common counts for work and labour, it was held that the plaintiff having established his case by other evidence was not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement which fixed the price and which the defendant did not give notice to the plaintiff to produce. In *Fielder v. Ray*, 6 Bingh., 332, after the plaintiff had proved by witnesses a case of implied or oral contract, it was held that he could not be non-suited by the defendant's producing an unstamped written instrument purporting to contain the terms of the contract. TINDAL, C. J., said: "It was incumbent on the defendant in that stage of the cause to prove the existence of the agreement, by producing it in a form in which it could be received, that is, properly stamped. . . . We cannot see judicially that the instrument is in existence unless it is produced properly stamped," and Mr. Justice BURROUGH said: "When the plaintiff's case has been closed, the defendant is not to get rid of it by suggesting the existence of a writing which he is unable legally to produce, and on the subject of which he might have cross-examined the plaintiff's witnesses."

The same rule has been applied in cases where the question was, as here, as to the terms on which landed property was let [75] to a tenant. In *The King v. The Inhabitants of Padstow*, 4 B. & Ad., 208, the respondents having proved by parol a taking of the premises by the pauper's husband, who occupied and paid the rent agreed on for two years, a witness for the appellant parish was called, who stated that he was present when the pauper's husband took the fields in question of his master, and that the conditions of taking were reduced into writing and signed by the parties on unstamped paper. Lord DENMAN, C. J., said that the rule undoubtedly is, that where a party has made out a *prima facie* case, and the opposite party attempts to cut it down by a written instrument, he must prove it; and PARKE, J., said that, if a party makes out a *prima facie* case without showing that there was any written contract the other party, if he relies on that written contract, must produce it. And in *Martson v. Dean*, 7 C. & P., 13, tried at the sittings at Westminster in 1835 before Mr. Justice COLERIDGE, an action by a landlord for use and occupation, it was held, and the learned Judge stated that he recollected several instances in point, that when the existence of a written agreement was not proved till the defendant had gone into his case, the plaintiff was not bound to put it in. See, also, to the same effect *Magnay v. Knight*, 1 Man. & Gr., 944, where the above mentioned decisions were referred to and acted on by the Court of Common Pleas.

None of the above authorities appear to have been brought to the notice of the learned Judge in the Court below, nor indeed were any of them cited to

us on the argument of the appeal. We consider, however, that they are applicable to the case now before us. The respondent in the Court below did not rely on or tender in evidence any document executed when Tricum Sewji's occupation of the land in dispute commenced in 1866. The reason he did not was doubtless because his legal advisers knew it was inadmissible for want of registration, and, therefore, made no mention of it in the defendant's written statement; and, as was said by TINDAL, C. J., in *Felder v. Ray*, 6 Bing., 332, the Court could not see judicially that any such instrument was in existence, unless it was produced in proper form, i.e., as regards the present case unless it had been duly registered according to the [76] law then in force in British India. The argument, therefore, addressed to us on behalf of the respondent, that the foundation of the appellant's claim is a written document, falls to the ground, as no such document was tendered in evidence, nor was, nor is, legally in existence.

The original grant, if there was one, not being before the Court, the evidence must be looked at to see what were the terms of the tenancy by which the appellants and their predecessors in title hold and held the property. The respondent in cross-examination stated that Tricum Sewji built the house, and he did not know whether his father let the land to him, but there was no house on it before Tricum built it; that there were other pieces of land in the same plot which were given to people to build on. He stated he went over the house with Mr. Campbell, the architect and civil engineer, and Mr. Campbell in his report dated the 16th March 1892, (Exhibit No. 12) said that he was informed that the chawl on the land in dispute was built about 26 years ago, i.e., about 1866. He also said in that report that he estimated the cost of the chawl when new at Rs. 3,000, which shows that at the time of the original building a very substantial sum was laid out.

Mr. Cursetji F. Chapkar, a licentiate of civil engineering of the Bombay University, who surveyed the house for the appellants in January 1892, stated in his report (Exhibit 9) that the property is situated at Arthur Road, a greater portion of its frontage commanding DeLisle Road, and that such situation is very desirable on account of its being at the junction of two main roads, viz., DeLisle Road and Arthur Road, and being only about three minutes' walk from the railway station, i.e., the Chinchpokli Station on the G.I.P. Railway. Arthur Road is a road running diagonally across the Flats in a north-north-easterly direction from Tardeo to near the road leading to Government House, Parel. The land in dispute with the chawl on it occupies $8\frac{1}{2}$ kathis and is 85 feet in length and 30 feet in breadth, facing, as it does, Arthur Road.

The evidence shows that from the first down to 1885 the rent had always been paid at the annual rate of Rs. 102 for the [77] ground. In the receipts for the rent put in by the appellants and the respondent, the rent is uniformly described as "the rent of ground of $8\frac{1}{2}$ kathis (85 feet in length and 30 feet in breadth) used and occupied at the rate of one rupee per kathi each per month." In more recent years the rent has, no doubt, been paid at irregular intervals, after six or two months or after one month. Tricum Sewji, the original grantee, became insolvent. Sometimes the respondent had to sue for it in the Court of Small Causes. It was stated, however, before us by the learned counsel for the respondent, and we think correctly, that whether the payments were yearly or monthly did not affect the question.

Tricum Sewji and his successors in title appear undoubtedly to have considered that they had an absolute interest in the property, subject to the payment of an annual rent of Rs. 102 to Tukaram Moroji and his son the defendant. In the conveyance dated the 20th June 1876 (Exhibit 13), by Mulechand Lilladhar and Moti Lilladhar and Mr. Gamble, Official Assignee of

the insolvent Tricum Sewji, to Solomon Aroon Gandel, after reciting an indenture of mortgage dated the 23rd September 1871, by Tricum Sewji to Mulchand Lilladhar and Moti Lilladhar to secure Rs. 351-4-0, by which the premises were mortgaged unto and to the use of Mulchand and Moti Lilladhar, their heirs and assigns, and the sale by such mortgagees by public auction, with the consent of Mr. Gamble, to Solomon Aroon Gandel, for the sum of Rs. 550 the premises which are described as a piece or parcel of fazendari land or ground with the messuages, tenement or dwelling-house standing thereon were granted, released and confirmed to Solomon Aroon Gandel, his heirs, executors, administrators and assigns unto and to the use of Solomon Aroon Gandel, his heirs, executors, administrators and assigns for ever subject to the payment of the fazendari rent and all rates, taxes and Assessments. That conveyance is in English and was attested by Mr. Rahimtola Mahomed Sayani, solicitor of Bombay, an experienced and careful lawyer, and in whose office the conveyance was probably prepared, and who would doubtless take care that the recitals and other statements in it were accurately set forth.

[78] The conveyance dated the 2nd July 1878, (Exhibit A) by Solomon Aroon Gandel to Gopal Yeshwant, the husband of the appellants, was also in English, but was not attested; and judging from its language was not drawn by any duly qualified legal practitioner. It was a conveyance in consideration of Rs. 500 to Gopal Yeshwant, his heirs, executors and assigns, subject to the payment of the fazendari rent and all taxes, rates and dues, and by it Solomon Aroon Gandel, his heirs, executors, administrators, and assigns bound themselves to make the said messuage, tenement or dwelling-house and premises free and clear from all disputes and embarrassment whatever arising by way of mortgage or inheritance by their own costs and expenses, and that they should and would warrant and for ever defend,—a covenant he would not have been likely to enter into unless he considered that he had an absolute interest in the property, and he too, as he described himself in the document, a Jew inhabitant of Bombay, and thus one of a race generally considered to be cautious and circumspect in regard to business and money matters.

The respondent's contention is that from 1866 Tricum Sewji and his successors in title were mere monthly tenants, liable to be turned out at a month's notice, although Tricum Sewji had built the house, there being admittedly no house on the ground before. Assuming for argument's sake that such was the position of Tricum Sewji when he took the land, what would be the rights of the appellants when they filed the present suit on the 25th of January 1892?

In a case decided by the House of Lords in 1866—*Ramsden v. Dyson*, L. R., 1 H. L., 129,—the Lord Chancellor (Lord CRANWORTH) stated what were the principles of equity on the subject. He said (page 140): "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he [79] had fallen, it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented." Lord KINGSDOWN said (p. 170): "If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord or without objection by him,

lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell*, 18 Ves., 328, and, as I conceive, is open to no doubt." Then, after stating that there has been a difference of opinion among great Judges as to the nature of the relief to be granted, he says: "But I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief, and protect in the meantime the possession of the tenant."

In a case that came before the Judicial Committee of the Privy Council in 1884, on appeal from the Court of Appeal, New Zealand, *Plimmer v. Mayor, &c., of Wellington*, 9 App. Ca., 699, the passage just cited from Lord KINGSDOWN's judgment was quoted as being the law relating to such cases; and the Privy Council, when considering the question as to the extent of interest which Plimmer acquired by his expenditure in 1856 for the extension of his jetty and for the erection of a warehouse at Wellington harbour, say: (p. 713) "Referring again to the passage quoted from Lord KINGSDOWN's judgment, there is good authority for saying what appears to their Lordships to be quite sound in principle, that the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated. In such a case as *Ramsden v. Dyson*, L. R., 1 H. L., 129, the evidence (according to Lord KINGSDOWN's view) showed that the tenant [80] expected a particular kind of lease, which Vice-Chancellor STUART decreed to him, though it does not appear what form of relief Lord KINGSDOWN himself would have given. In such a case as *Duke of Beaufort v. Patrick*, 17 Beav., 60, nothing but perpetual retention of the land would satisfy the equity raised in favour of those who spent money on it, and it was secured to them at a valuation. In such a case as *Dillwyn v. Llewelyn*, 4 DeG. F. & J., 517, nothing but a grant of fee simple would satisfy the equity which Lord Chancellor (Lord WESTBURY) held to have been raised by the son's expenditure on his father's land. . . . In fact, the Court must look at the circumstances in each case to decide in what way the equity can be satisfied."

In the case now before us the receipts for rent put in evidence at the hearing are printed, and are headed Chinchpokli, in which district, according to Colonel Laughton's survey map of 1872, the property in dispute is situated, and each of them is signed by the respondent. We entertain little doubt that the plot of ground so granted was, as stated in the two indentures already referred to, fazendari land, the tenure of which description of property is well known and is very common in this island, under which the fazendar or landlord of the district or the part in which the land is situated is entitled to a fixed yearly rent, and as long as that is paid, the fazendar tenant, who had undoubtedly an assignable and transferable interest, cannot, nor can his assignees or transferees be ejected by the fazendar landlord.

It would be a breach of contract, and little short of a direct fraud on the part of this respondent, if he were to be allowed to treat the appellants as mere monthly tenants, and, by giving them a month's notice to quit, to claim the property, and, as he has done, to eject them, and that, too, without any compensation whatever.

The learned counsel for the respondent argued, and we think correctly, that the present case ought to be decided according to English law. Act No. XI of 1855 of the Governor-General in Council, section 4, which applies only to cases under English law, secures to *bona fide* holders under defective titles the value [81] of buildings erected or improvements made by them in the belief that they

had an estate in fee simple or other absolute estate. That Act has, by Act XV of 1874, section 3, been declared to be in force in the whole of British India, except the scheduled districts. The appellants, however, wish to retain possession of the property in dispute, in preference to being paid the value of the buildings erected on the land. In the case of *Beni Madhab Banerjee v. Jai Krishna*, 7 Beng. L. R., 152, which came before Sir BARNES PEACOCK, C.J., and two other Judges in 1869, the first Appellate Court (KEMP, J., and GLOVEY, J.) being divided in opinion, Sir BARNES PEACOCK, who agreed with Mr. Justice KEMP, said that that learned Judge thought that, in equity, the plaintiff was not entitled to turn the defendant out of the lands, because he stood by and saw them erecting *pucka* buildings on the land without any objection whatever. Sir BARNES PEACOCK then said that, if the plaintiff allowed the defendants to erect *pucka* buildings upon the land without objecting, it appeared to him that he was bound in the same way, in equity, as if he had granted them a *potta* with the privilege of building *pucka* houses on the land, and he thought that Mr. Justice KEMP was right in holding that the plaintiff was precluded by his conduct from turning the defendants out of possession. He then said: "Independently of this, speaking for myself, I should say that if one man grants a tenure for another for the purpose of living on the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest he does not necessarily get rid of his liability to pay the rent reserved." The two other Judges concurring, Mr. Justice KEMP's decision was affirmed. That decision was approved of and followed in *Lalla Gopi Chand v. Liakut Hossein*, 25 Cal. W. R., 211.

In *Gungadhar Shikdar v. Ayimuddin Shah Biswas*, 1 L. R., 8 Cal., 960, decided in 1882 by GARTH, C. J., and MITTER, J., where it was conceded that the land in dispute was not let for agricultural purposes, [82] and it was found that after the grant (whatever it was) buildings of a substantial character were erected some sixty years ago by the defendant's ancestors, and that they and their ancestors had lived there ever since, the Court held that under these circumstances they thought that the Courts below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character. The Court added that this had been explained in several recent cases, and, amongst others, in the case of *Prosunno Coomar Chatterjee v. Jagun Nath Bysack*, 10 Cal. L. R., 25.

We are of opinion that there is in the present case evidence from which the Court can reasonably presume that the land was granted in or about 1866 to Tricum Sewji for building purposes. It was a small plot of ground facing the Arthur Road, which, though doubtless marked out, and its direction well known, was not, as, in answer to a question put by us to the Municipal Commissioner for the City of Bombay, we have been courteously informed by him, actually made until 1868. The position of the ground, and the rent reserved, preclude any idea that it was let for agricultural purposes. In that locality and on the other portions of the Flats in and near the centre of that part of the island, which, as is well known, until the erection of the Hornby Vellard during the time of Mr. William Hornby (who was Governor of Bombay from 1776 to 1784), which closed the main breach of the sea from Mahalaxmi to Love Grove, and rescued the Flats from being flooded each tide with salt water, only rice crops could be grown. The soil is bad, and unless a layer of earth be placed over it, little else than rice can be cultivated.

Tukaram Moroji must have seen, and knowing what he had granted, of course made no objection to Tricum erecting the building on the ground. Even if the Court were not justified in holding that the grant was originally for building purposes, the fact that the building which Tricum Sewji placed upon the ground was not objected to by Tukaram, who, according to his son's evidence, lived until 1874, or since then by his son, and [83] that he and his son received the rent, at first yearly, but afterwards at shorter intervals until nearly twenty-five years afterwards, by his attorney's letter of the 30th September 1891, (Exhibit XI) the respondent treated the appellants as his monthly tenants and required them to vacate on the 1st November 1891, shows that the position which he then took up was a mistaken one, and that, by his father's and his own conduct, he was, and is, precluded from recovering the land and premises from the appellants in the manner he seeks.

The decree, therefore, dismissing the suit with costs must be reversed, and in lieu thereof this Court passes a decree in favour of the appellants in terms of paragraph (a) of the prayer of the plaint. (His Lordship read the paragraph and continued.) The respondent must deliver forthwith to the appellants possession of the land and premises, of which on or about the 13th August 1892, he was put in possession under the decree in Suit No. 25011 of 1891 passed by the Bombay Court of Small Causes. And in the event of parties not agreeing, there must be a reference to the Commissioner of this Court to take an account of the rents and profits received by the respondent since he was so put in possession, which, after making all just allowances, he is already ordered to pay to the appellants. The respondent to pay to the appellants their costs in the lower Court including costs below and of this appeal, and to bear his own costs throughout, and repay to the appellants any costs which under the decree of the Court below they may have paid to him, and also repay to the appellants any costs paid by them to him under the decree in Suit No. 25011 of 1891 in the Court of Small Causes dated the 5th December 1891. If there be a reference to the Commissioner, further directions and further costs will be reserved with leave to apply as advised.

Decree reversed.

Attorneys for the Appellants :—Messrs *Chalk, Walker and Smetham.*

Attorneys for the Respondent :—Messrs. *Balkrishna and Pheroazsha.*

NOTES.

[On the ground of estoppel by erection of buildings, see (1899) 21 All., 496 P.C. ; also (1900) 27 Cal., 570 ; (1899) 1 Bom. L.R., 191 ; (1894) 16 All., 328 ; (1897) 3 C.W.N., 255 ; (1895) 20 Bom., 1 ; (1896) 22 Bom., 1 ; (1895) 22 Cal., 820.

As regards the right of the tenant to build on the land demised and to the buildings so erected, see (1903) 27 Mad., 211, where the subject was fully discussed by Sir V. BHASHYAM AYYANGAR, J.]

[84] APPELLATE CIVIL.

The 10th January, 1893.

PRESENT:

MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

Pundlik.....(Original Plaintiff) Appellant

versus

Achut.....(Original Defendant) Respondent.*

*Limitation—Limitation Act (XV of 1877), Sec. 5—Review of judgment—**Application for review—Sufficient cause for delay in filing an appeal.*

Though under certain circumstances the presentation of an application for review may be considered as sufficient cause for delay in filing an appeal, the appellant is bound to satisfy the Court that such circumstances did exist in his case, and that he had sufficient cause for not presenting the appeal within the prescribed period.

The plaintiff obtained a decree for possession of certain land in the Court of First Instance. This decree was reversed by the Appellate Court on 28th October 1890. The plaintiff applied for a review of judgment of the Appellate Court on 27th January 1891. The petition of review was rejected on 18th March 1891. Thereupon the plaintiff preferred a second appeal to the High Court on 13th April 1891.

Held, that the second appeal was time-barred. The time taken in prosecuting the application for review could not be deducted in calculating the period of limitation, as the plaintiff had not shown that he had reasonable grounds for asking for a review.

THIS was a second appeal from the decision of Arthur H. Unwin, District Judge of Kanara, in Appeals Nos. 169 and 192 of 1890 of the district file.

The plaintiff sued to eject the defendant from the lands in dispute, alleging that defendant was a trespasser in wrongful possession.

The Court of First Instance passed a decree awarding possession to the plaintiff as prayed for.

This decree was reversed, and plaintiff's claim was rejected, on appeal, on 28th October 1890.

On 27th January 1891, the plaintiff applied for a review of the judgment of the Appellate Court. The petition of review was rejected on 18th March 1891.

Thereupon plaintiff preferred a second appeal to the High Court on 13th April 1891.

At the hearing of the appeal the respondent's pleader raised a preliminary objection that the appeal was time-barred, having [85] been filed more than 90 days after the date of the Lower Appellate Court's decree.

Shamrao Vitthal (with him *N. G. Chandavarkar*) for Appellant:—We applied for a review of the lower Court's judgment on the ground of the discovery of new evidence. The time occupied in the review should be excluded from computation—*Trimbakraj v. The General Traffic Manager of the G. I. P. Railway Company*, P. J. for 1880, p. 345.

Ghanasham Nilkanth for Respondent:—The mere presentation of a petition of review is not a sufficient reason for filing an appeal beyond time. The appellant must show that he had reasonable grounds for asking for a review. This he has not done in the present case. There is nothing to show that the lower Court was wrong in refusing to grant a review. The delay in filing the appeal should not, therefore, be excused.

* Second Appeal, No. 511 of 1891

Candy, J. :—We think that the appellant in this case has failed to show that he had reasonable grounds for asking for a review and, therefore, the time taken in prosecuting the application for review cannot be deducted in calculating the period of limitation, and thus the present appeal is time-barred. The only evidence before us in regard to this matter is a copy of the order of the District Judge rejecting the application for review on the ground that no sufficient reason had been shown why the evidence referred to in the application was not adduced at the original hearing of the suit, while there was "every reason why, if relevant, it should have been adduced before all other." No copy of the application for review has been referred to before us, nor has any attempt been made to show when the fresh evidence was discovered, and how long afterwards the application was made, or that the District Judge was in error in the strong opinion which he expressed.

The ruling in *Trimbakraj v. The General Traffic Manager of the G. I. P. Railway Company*, P. J for 1880, p 345, shows that, under certain circumstances, the presentation of an application for review may be considered as sufficient cause for delay in filing an appeal. But in the present case we do not think that such circumstances are proved to exist. Under the proviso to Rule 9 (VI) of Chap-[86]ter I of the High Court Rules, it was incumbent on appellant to be prepared to satisfy the Court that he had sufficient cause for not presenting his appeal within the time prescribed by law. This he has not done, and his appeal must be dismissed. All costs on appellant.

Appeal dismissed.

NOTES.

[In (1906) 33 Cal., 1323 ; (1914) 26 M.L.J., 356 22 I.C., 919, the decisions were similar as regards the exclusion of the time occupied in review proceedings.]

[18 Bom. 86]

APPELLATE CIVIL.

The 11th January, 1893.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Lomba Gomaji.....(Original Plaintiff) Appellant
versus

Vishvanath Amrit Tilvankar.....(Original Defendant) Respondent.*

Mortgage—Sale of property subject to a mortgage in execution of a money decree obtained by plaintiff against mortgagor—Subsequent mortgage of same property by original mortgagor and first mortgagee paid off—Possession taken by new mortgagee—Suit for possession by plaintiff as purchaser in execution—Right of purchaser to recover—Right of second mortgagee to be repaid his advances by plaintiff keeping alive the first mortgage.

On the 10th June 1885, Tikaram mortgaged the property in dispute to Ganpat along with some other property. In 1886 the plaintiff obtained a money decree against Tikaram and in execution of his decree he sold the property in dispute and obtained a certificate of sale on the 1st November 1886.

* Second Appeal, No. 454 of 1891.

On the 13th February 1888, Tikaram mortgaged the property in dispute along with other property to the defendant and paid off Ganpat's mortgage. Ganpat thereupon returned the mortgage-deed to Tikaram with a receipt for payment endorsed. After payment of Ganpat's mortgage the defendant took possession of the property. In July 1888, Tikaram executed a further mortgage of the property to the defendant for Rs. 8,000.

On the 30th August 1888, the plaintiff having attempted to take possession was obstructed by the defendant. Thereupon the plaintiff brought this suit for possession.

Held that the plaintiff was entitled to possession. The mortgage to the defendant was subsequent to the plaintiff's purchase of the equity of redemption. The defendant did not know of that purchase. He took the mortgage from Tikaram, to whom he advanced the money to pay off the previous mortgage to Ganpat. There was nothing to show that there was any intention to keep Ganpat's mortgage alive in favour of the defendant.

Gokul Doss v. Rambur, L. R., 11 Ind. App., 126, distinguished.

Held also, that as plaintiff was seeking to recover property which but for the defendant's payment to Ganpat would have been burdened with Ganpat's mortgage, [87] and as the defendant when he advanced the money to Tikaram to pay off that mortgage did not know that Tikaram was no longer the owner of the equity of redemption, the plaintiff should give credit to the defendant for the sum paid by him; but as the defendant's mortgage comprised other properties besides the one in dispute, the plaintiff should recover possession on payment to the defendant of a proportionate part of Ganpat's mortgage-debt having regard to the value of the property in dispute and that of the other mortgaged properties.

Mahomed Shumsool v. Shewukram, L. R. 2 Ind. App., 7, followed.

SECOND APPEAL from the decision of T. Hart-Davies, Assistant Judge of Poona.

On the 10th June 1885, one Tikaram Lachhiram mortgaged the property in question with other properties to Ganpat Dalsaram for Rs. 500. The mortgagee was given possession.

On the 18th June 1886, the plaintiff, who had obtained a money decree against Tikaram (the mortgagor), caused the mortgaged property to be sold in execution, and at the sale himself became the purchaser. The sale to him was confirmed in November 1886.

On the 13th February 1888, Tikaram executed a mortgage of the property in dispute along with other properties to the defendant for Rs. 5,000. Ganpat Dalsaram joined in this transaction, and on the 14th February 1888, his mortgage was paid off out of the Rs. 5,000. He returned his mortgage-deed to Tikaram with an endorsement of satisfaction of his debt as follows:—"I, the creditor named Ganpat Dalsaram Gujar, having entered satisfaction on the back of this mortgage, have received moneys as follows:—Rs. 500, I have received Rs. 500 in respect of the said mortgage right. . . . The above-mentioned amount of Rs. 3,606, which is caused to be paid by Vishvanath Amrit Tilvankar. . . . for redeeming two mortgaged fields, two bungalows and two houses in all, which I held in mortgage, and for mortgaging the same to Tilvankar, I have received in full. Now there is nothing whatever due to me on the property. I have relinquished all my mortgage rights, and have delivered all the letters and papers to him for enjoyment."

The new mortgage-deed to the defendant contained the following passage:—"We have received, in all, from you Rs. 5,000 of [88] the Surat currency for paying to Rajeshri Ganpat Dalsaramshet in order to redeem our property which is mortgaged to him and to mortgage the same to you. . . . We . . . have of our own free will received payment in respect of this mortgage-deed. The details are as follows: having paid Rs. 3,606 in cash to Rajeshri Ganpat Dalsaramshet we have obtained the mortgage-deed with an intention of satisfaction thereon, &c."

Upon the execution of this mortgage the defendant took possession, the previous mortgagee (Ganpat Dalsaram) having been paid off as already mentioned.

On the 5th July 1888, Tikaram executed a further mortgage of the property to the defendant for Rs. 8,000.

On the 30th August 1888, the plaintiff attempted to take possession of the property under his sale certificate, and he was resisted by the defendant. He then applied to the Court executing the decree to have the obstruction removed, but his application was rejected.

The plaintiff thereupon brought the present suit to have the order rejecting his application set aside, and for possession of the property.

The defendant contended (*inter alia*) that as he had satisfied Ganpat Dalsaram's mortgage lien, which was prior in date to the plaintiff's purchase and had been put in possession and that the plaintiff was aware of that fact, that the plaintiff's remedy was a suit for redemption and not for possession.

The plaintiff preferred a second appeal.

Inverarity (with *Mahadeo Bhaskar Chavhai*) for the Appellant (plaintiff) :— When the plaintiff purchased the property in execution of his decree, Ganpat's mortgage lien was in existence. Subsequently to that purchase Tikaram paid off Ganpat's mortgage, and the result was that when the plaintiff sought to recover possession in execution, the property was free from that mortgage. The documents clearly show that the parties to the transaction of February 1888, intended simply to wipe off Ganpat's mortgage; if they had intended otherwise, the defendant would have taken an assignment of the mortgage from Ganpat. The plaintiff is, therefore, [89] entitled to recover possession without paying anything to the respondent—*Ram Tukul Singh v. Visveswar Lall*, L. R., 2 Ind. App., 131 at p. 143; *Gadgeppa v. Apaji*, I. L. R., 3 Bom., 237; *Krishna Reddi v. Muttu Narayana Reddi*, I. L. R., 7 Mad., 127. Supposing that the plaintiff is liable to making any payment to defendant on account of Ganpat's mortgage lien on the ground that that lien was prior to his purchase, this liability should be limited to the property which he purchased. He should not be made liable to pay the whole of the lien, which extended over some other property which he has not purchased.

Mahadeo Chimnaji Apte, for the Respondent (defendant) :—The intention to keep alive Ganpat's mortgage lien in the defendant's favour is shown by the endorsement made on his mortgage-deed and also by the conduct of the parties. If Ganpat's mortgage had been merely wiped off, the mortgage-deed would not have come into the defendant's possession. The endorsement distinctly says that Ganpat's mortgage was paid off for the purpose of mortgaging the property to the defendant. Therefore the transaction is tantamount to an assignment—*Gokulbloss v. Rambux*, L. R., 11 Ind. App., 126; *Gangadhara v. Sivarama*, I. L. R., 8 Mad., 246; *Mahomed Shumsool v. Shewukram*, L. R., 2 Ind. App., at p. 17. The defendant had no notice of the plaintiff's purchase, and, therefore, he paid off Ganpat's mortgage, and advanced money to the mortgagor. But now owing to the plaintiff's purchase the defendant's transaction was, by the lower Court, held to be abortive. A man paying an incumbrance honestly, though unauthorisedly, is entitled to be recouped in *justico*, equity and good conscience—*Nilo Pandurang v. Rama Patloji*, I. L. R., 9 Bom., 35.

Sargent, C. J. :—As the defendant's mortgages in 1888 were subsequent to the plaintiff's purchase at auction sale on 18th June 1886, of Tikaram's equity of redemption, it is plain that the defendant can have no defence to the

plaintiff's suit for possession, unless Ganpat Dalsaram's mortgage, to which the property was subject when the plaintiff purchased it, can be regarded: for there was no formal assignment of it, as having been kept alive in his favour. We agree with the Joint Sub-[90]ordinate Judge that no such intention can be gathered from what took place when the first mortgage was passed to defendant.

Mr. Apte relied on the Privy Council's decision in *Gokul Doss v. Rambux*, L. R., 11 Ind. App., 126, to show that the intention ought to be presumed, but the principle laid down in that case only applies where, as their Lordships explain it, "the estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, in which case (in England) it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable." Such was the case in *Gangadhara v. Sivarama*, I. L. R., 8 Mad., 246, which proceeded on the ruling in *Gokul Doss v. Rambux*, L. R., 11 Ind. App., 126. But here there was no intermediate mortgage to be protected against from which an intention to keep Ganpat's mortgage alive can be gathered, nor has it ever been suggested in either Court, that the defendant was aware of the plaintiff's purchase. On the other hand, the evidence that defendant took no part in paying off Ganpat's mortgage, and that the receipt endorsed on it was in favour of Tikaram, together with the recital in defendant's mortgage deed that the mortgage had been paid off out of the money advanced by defendant, without any words showing an intention to keep it alive, indicates that the only object the defendant had in view was to insure the property being cleared from Ganpat's mortgage.

It remains, however, to consider whether this is a case in which the Court ought, as Mr. Apte contends it should, on the principle acted on by the Privy Council in *Mahomed Shumsool v. Shewurkram*, L. R., 2 Ind. App. at p. 17, to refuse to give the plaintiff possession except on the condition of his recouping the defendant for what he paid to satisfy Ganpat's mortgage, and thus freeing the estate from an incumbrance to which it would have been liable in his hands. The cases of *Ram Tuhul Singh v. Biseswar Lall Sahoo*, L. R., 2 Ind. App., 131, and *Gadgeppa v. Apaji*, I. L. R., 3 Bom., 237, were relied on by Mr. Inverarity for the plaintiff. In the case before the Privy Council it is to be observed that the plaintiff was the party who had [91] paid the money, and he sought to recover it from the defendant who had benefited by it, and their Lordships at the bottom of page 141 distinguished it on that ground from the case of *Bellamy v. Sabine*, 2 Ph., 425, before Lord COTTENHAM and others of that class where the plaintiff seeks the aid of a Court of Equity and the Court proceeds on the broad ground that he who seeks to be relieved on equitable grounds must do equity. Moreover, the money was paid in that case against the will of the party who was said to have benefited by it. In *Gadgeppa v. Apaji*, I. L. R., 3 Bom., 237, the plaintiff was also the party who had paid the money, and the Court relied on *Ram Tuhul Singh v. Biseswar Lall Sahoo*, L. R., 2 Ind. App., 131.

Those cases, therefore, differ from the present one, in this important respect that the plaintiff is here invoking the aid of the Court to recover the property from defendant, which, but for defendant's payment to Ganpat, would have been burdened with Ganpat's mortgage; and unless defendant knew that Tikaram was no longer the owner of the equity of redemption, when he advanced the money to Tikaram, which, as found by the Subordinate Judge, was not the case, and was not relied on in the lower Court of appeal, it is difficult to see how the present case is in principle to be distinguished from *Mahomed Shumsool v. Shewurkram*, L. R., 2 Ind. App., at p. 17. In both cases there is a subsisting

charge on the property paid off by" the person in possession, which, as their Lordships say, makes it "equitable when the plaintiff reclaims the estate, that credit should be given to the purchaser (in this case the mortgagee) for the payment of the mortgage which the plaintiff would otherwise have had to meet."

It was said, however, and we think rightly, that plaintiff cannot be called on to pay more than a proportionate part of the money paid in satisfaction of Ganpat's mortgage-debt, as his mortgage security consisted of other properties as well as the one in dispute. That is all the defendant would have had ultimately to meet, as, even if he must have paid the whole mortgage-debt to recover the property in question, he would have been entitled to contribution by Tikaram in respect of the rest of the mortgaged property.

[92] We think, therefore, that the decree must be varied by directing that the plaintiff do recover the property on payment to the defendant of the proportionate part of Ganpat's mortgage-debt, having regard to the values of the property in question and that of the other mortgaged properties. The sum to be so paid to be determined in execution. Parties to pay their own costs of this appeal.

Decree varied.

NOTES.

[See also (1893) 18 Bom., 348; (1896) 21 Bom., 567, (1911) 35 Bom., 438. In (1907) 36 Cal., 193 it was pointed out that the decision in 18 Bom., 348 was not inconsistent with the principle that there must be a complete satisfaction before subrogation.]

[18 Bom. 92]

APPELLATE CIVIL.

The 11th January, 1893

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY.

Desai Motilal Mangalji.....(Original Plaintiff) Appellant

versus

Desai Parashotam Nandlal.....(Original Defendant) Respondent.*

Registration—Evidence—Act III of 1877, Sec. 17—Retrospective operation of section—Document not registrable under Act in force (XX of 1866) when executed, but requiring registration under Act III of 1877—Immoveable property, what is—Hereditary allowance attached to office of Desai not immoveable property under Act XX of 1866—Deed of gift of such property originally not registrable—Hereditary office when immoveable property by Hindu law—Desaigiri sukhdi.

* Section 17 of the Registration Act (III of 1877) should not be construed as requiring a document to be registered which would not have required registration when it was executed. *Raju Balu v. Krishnarav*, I. L. R., 2 Bom., 273, distinguished.

An instrument which did not require registration under Act XX of 1866 is not inadmissible in evidence by reason of Act III of 1877.

Dues incidental to an office such as that of a Desai, which is capable of being held by a person other than a Hindu, were not immoveable property when the Registration Act XX of 1866 was enacted.

* Second Appeal, No. 754 of 1891.

SECOND APPEAL from the decision of T. Hart-Davies, Joint Judge of Ahmedabad.

The plaintiff Desai sued to recover Rs. 99 on account of his share in the Desaigiri *sukhdi* allowance for three years. He alleged that he and the defendant were members of the family of the Bania Desais of Godhra, that the *sukhdi* allowance was received from the Government treasury by a senior representative of the family; that a dispute having arisen between the defendant's father and the plaintiff's father, it had been agreed that the defendant's father and his descendants should continue to recover the allowance and should pay Rs. 33 out of it to the plaintiff's father and his descendants every year, and that an agreement to that effect had been accordingly executed by the defendant's father on the 24th May 1866. The defendant had refused to pay the plaintiff's share of the allowance since 1886.

The defendant denied the plaintiff's right to a share in the allowance, disputed the genuineness of the agreement sued on, and contended that it was inadmissible in evidence for want of registration.

The Subordinate Judge found that the agreement sued upon was a deed of gift which being unregistered was not admissible in evidence. He, therefore, rejected the claim.

The plaintiff preferred a second appeal.

Gokuldas K. Parekh, for the Appellant:—Hereditary allowances are for the first time included in immoveable property for the purposes of registration by section 3 of the Registration Act III of 1877. The document in question was passed in 1866; and at that time hereditary allowances were not immoveable property for the purposes of registration. Act III of 1877 has no retrospective operation—*Ram Coomarr Singh v. Kishari*, I. L. R., 9 Cal., 68. Hereditary allowances may be immoveable property under Hindu law; but the office of a Desai is not such as is incapable of being held by persons other than Hindus. We find that even Mahomedans and Parsis are Desais. Therefore the question whether Desaigiri *sukhdi* is immoveable property for the purposes of registration, cannot be governed by Hindu law—*Maharana Fattehsangji v. Desai Kallhanraji*, L. R., 1 Ind. App., 34.

Rao Sahib Vasudeo J. Kirtikar (Government Pleader), for the Respondent (Defendant):—The Registration Act III of 1877 has retrospective operation—*Lachman Das v. Dip Chand*, I. L. R., 2 All., 851; *Raju Balu v. Krishnarav*, I. L. R., 2 Bom., 273. As the suit is between Hindus, the question whether Desaigiri *sukhdi* is immoveable property should [94] be determined by Hindu law. Hereditary offices are immoveable property under Hindu law—*Balvantrav v. Purshotam*, 9 Bom. H. C. Rep., 99; *The Government of Bombay v. Gosvami Shri Girdharlalji*, 9 Bom. H. C. Rep., 222; *Krishnabhat v. Kupabhat*, 6 Bom. I. C. Rep., 137, A. C. J.

Sa ent, C. J.:—The plaintiff in this suit, which has arisen out of a dispute between two branches of the Bania family of Desais of Godhra, sues on an agreement (Exhibit 3) dated 24th May 1866, by which the defendant undertook that he and his descendants would pay the plaintiff's father and his descendants an annual sum of Rs. 33 out of the *sukhdi* allowance payable out of the Government treasury at Godhra and which was to be collected by the defendant and his descendants. Both the lower Courts have held that the document was a deed of gift of immoveable property and required registration under section 17 of Act III of 1877, and not being registered, was not admissible in evidence.

Act XX of 1866 was the Registration Act applicable to the document when it was executed, and much argument has been addressed to us on the question

whether such a *sukhdi* was immoveable property when that Act came into force. It was common to both parties that the *sukhdi* was an allowance incidental to the hereditary office of Desai, and, as such, it was contended for the respondent that, on the authority of the decisions in *Balvantrav v. Purshotam*, 9 Bom. H. C. Rep., 99, and *The Government of Bombay v. Gosvami Shri Girdharlalji*, 9 Bom. H. C. Rep., 222, it was of the nature of immoveable property. On the other hand, it was contended by Mr. Gokuldas, for the appellant, that the rulings in these cases only applied to hereditary offices which could only be held by Hindus such as that of a village Joshi, and that the office of Desai, any more than that of a patil, was not necessarily held by a Hindu, and might be held by a Mahomedan or Parsi. This latter statement was admitted by Mr. Vasudev, but he contended that the rulings applied to all hereditary allowances.

It is to be remarked that what was actually decided in *Balvantrav v. Purshotam*, 9 Bom. H. C. Rep., 99, was that the dues incidental to an hereditary [95] office such as a village Joshi was by Hindu law regarded as immoveable property. In *The Government of Bombay v. Gosvami Shri Girdharlalji*, 9 Bom. H. C. Rep., 222, where the question was as to the nature of allowances to a Hindu temple, Mr. Justice MELVILL no doubt refers to the last case as deciding that "allowances incidental to hereditary offices are immoveable property." However, in *Maharaja Fettehsingji v. Desai Kallianraji*, L. R., 1 I. A., at p. 50, their Lordships of the Privy Council treat the ruling to be that for the interpretation of section 1, clause 12 of Act XIV of 1859 immoveable property must, when it concerns the rights of Hindus, be taken to include whatever Hindu law classes as immoveable, and their Lordships say they see no objection to the rule within proper limits, and express approval of the decision on the ground "that Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community incapable of being held by any person not a Hindu were in the nature of immoveables."

We think it is impossible, with due regard to these remarks of the Privy Council, to hold that the dues incidental to an office such as that of Desai were immoveable property when Act XX of 1866 was enacted, and it becomes necessary to consider the view taken by the Joint Judges that, whatever may have been the character of a Desai's *sukhdi* at the time Act XX of 1866 was enacted, the document in question required to be registered under section 17 of Act III of 1877, which includes hereditary allowances in the interpretation of "immoveable property." This raises a question of some difficulty on which the High Courts of Calcutta and Allahabad have apparently differed—*Ram Coomar Singh v. Kishari*, I. L. R., 9 Cal., 68, and *Lachman Das v. Dip Chand*, I. L. R., 2 All., at p. 853,—the former Court being of opinion that neither section 17 of Act III of 1877 nor the similar sections of the preceding Acts have the effect of rendering a document, which was not registrable under Act XVI of 1864, inadmissible in evidence under the succeeding Acts without registration. Mr. Justice GREEN had to consider section 17 in *Raju Balu v. Krishnarav*, I. L. R., 2 Bom., at p. 281, with respect to a docu-[96]ment dated 15th July 1865. After referring to the peculiar language of section 17 and pointing out that "the greater strictness of the requirements of Act VIII of 1871 and the earlier Registration Acts has been mitigated, and the Act was framed as it is, very probably with a view to admit to the benefit of such mitigations documents though executed before the day on which the Act came into force," he arrives at the conclusion that "the practical result is, that the provisions of Act III of 1877 apply to all documents tendered in evidence on or after 1st April 1877." It is to be remarked that the document in question, which was held to require registration in that case, was clearly

one which ought to have been registered under Act XVI of 1864. The case, therefore, has no direct bearing on the present question whether section 17 of the Act is to be construed as requiring a document to be registered which would not have required registration when it was executed. It is plain that if it is so regarded, as the Act provides no means of registering such a document (unless perhaps it was executed within three months before the Act of 1877 comes into force), the section will have the retrospective effect of invalidating for all practical purposes documents which when they were executed were free from defects according to the existing law. The presumption is of course against the Legislature having such an intention. The actual question here arises from the change in the interpretation clause which in the Act of 1877 includes "hereditary allowances" without any restriction in immoveable property, and we think that such a change cannot on principle affect instruments executed before the Act.

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

NOTES.

[See also (1911) 10 I. C., 314 (All.), as regards the inadmissibility in evidence.]

[97] CRIMINAL REVISION.

The 13th February, 1893.

PRESENT.

MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

Queen-Empress

versus

Shidgauda.*

Criminal Procedure Code (Act X of 1882), Sec. 263(h)—Summary trials—Magistrate's finding to contain a statement of the reasons for a conviction.

Under section 263 (h) of the Code of Criminal Procedure (Act X of 1882) a Magistrate, in recording his reasons for a conviction, must state them so that the High Court on revision may judge whether there were sufficient materials before him to support the conviction.

Empress v. Panjab Singh, I. L. R., 6 Cal., 579, followed.

THIS was an application under the criminal revisional jurisdiction of the High Court [section 435, Criminal Procedure Code (X of 1882)].

The accused was charged with having committed criminal trespass on certain land in respect of which the complainant had obtained a decree for possession in the Mamlatdar's Court.

The case was tried by the First Class Magistrate of Belgaum in a summary way under the provisions of Chapter XXII of the Code of Criminal Procedure (Act X of 1882).

The Magistrate convicted the accused under section 447 of the Indian Penal Code, and sentenced him to a fine of Rs. 25.

The Magistrate's judgment was as follows:—

"The complainant states that the accused prevented his tenants from keeping fuel and rubbish in the place decided by the Mamlatdar to be his, to

* Application for Revision, No. 390 of 1892.

cause annoyance to him. The witnesses called by the complainant support the complainant. The accused pleads not guilty and has called two witnesses to prove his innocence. The witnesses do not say that the accused has not committed the offence. I, therefore, direct that the accused should pay Rs. 25, or in default, should undergo rigorous imprisonment for thirty days."

The accused applied to the High Court, under section 435 of the Code of Criminal Procedure, for a revision of the Magistrate's proceedings.

[98] *Vasudeo G. Bhandarkar* for the Accused.

Chitgupe (with him Messrs. *Chitnis, Motilal and Moulvi*) for the Complainant.

Candy, J.:—The Magistrate's "brief statement of the reasons for conviction" (section 263 (h), Criminal Procedure Code) is simply,—“The witnesses called by the complainant support the complainant. The witnesses (for the accused) do not say that the accused has not committed the offence.” We are of opinion that this is not a compliance with law. We agree with the ruling in *Empress v. Panjab Singh*, I. L. R., 6 Cal., 579, that a Magistrate under this section in recording his reasons for the conviction should state them so that the High Court on revision may judge whether there were sufficient materials before him to support the conviction. The conviction must, therefore, be set aside, and the fine, if paid, refunded.

Conviction and sentence reversed.

NOTES.

[See also 21 All., 189; 10 A.L.J., 251.]

[18 Bom. 98]

APPELLATE CIVIL.

The 13th January, 1893.

PRESENT :

SIR CHARLES SARGENT, K.T., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Himatram.....(Original Judgment-creditor) Applicant

versus

Khushal Jethiram Gujar.....(Original Applicant) Opponent.*

Mortgage—Decree on mortgage—Sale in execution—Claim on property ordered to be sold under a mortgage decree—Civil Procedure Code (Act XIV of 1852), Secs. 275 and 287—Jurisdiction.

Himatram obtained a decree upon a mortgage against Dewji in 1891, and applied in execution for the sale of the mortgaged property. On the proclamation of the sale being issued, Khushal intervened, alleging that the property had been sold to him by Dewji in 1883 at a private sale. The Subordinate Judge allowed his claim, and stopped the sale, being of opinion that he had power, under section 287 of the Civil Procedure Code, to make this order.

Held, that the order was made without jurisdiction, and must be discharged. Proceedings by way of claim as provided by section 275 of the Civil Procedure Code (Act XIV of 1882) are not applicable where the property is directed to be sold under a mortgage decree, and section 287 had no application.

Deefholts v. Peters, I. L. R., 14 Cal., 631, followed.

* Application No. 113 of 1892 under Extraordinary Jurisdiction.

[99] THIS was an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against an order passed by Rao Saheb V. G. Kaduskar, Joint Subordinate Judge of Nasik.

In 1891 one Himatram obtained a decree in the Court of the Subordinate Judge at Nasik against Dewji on a mortgage. The decree directed the payment of the mortgage-debt within six months, or, in default, the sale of the mortgaged property. Default having been made, and the defendant being an agriculturist, the Subordinate Judge sent the proceedings to the Collector that he might sell the property, and realize the amount of the decree.

Before the date fixed for the sale, one Khushal Jethiram claimed the property in the Court of the Subordinate Judge, alleging that he had bought it from Dewji in 1883. He prayed for a declaration that the property was not liable to attachment. The Subordinate Judge cancelled the proclamation, and stopped the sale, and referred Himatram to a regular suit. He was of opinion that although section 278 of the Civil Procedure Code (XIV of 1882) did not apply to this case as there had been no attachment, yet that under section 287 of the Civil Procedure Code he could deal with Khushal's application and make the order. He held that the ruling of the Calcutta High Court in *Deefholts v. Peters*, I. L. R., 14 Cal., 631, was not applicable to the case.

Against the above order Himatram applied to the High Court in its extraordinary jurisdiction [Civil Procedure Code (XIV of 1882), section 622], contending that the Subordinate Judge had acted illegally and without jurisdiction. He obtained a rule *nisi* to set aside the above order. The rule now came on for argument.

Shivram V. Bhandarkar, for the Applicant, in support of the rule:—The Subordinate Judge had no jurisdiction to make the order stopping the sale. It is admitted that the order could not be made under section 278 of the Civil Procedure Code, as there was no attachment. Nor could it be made under section 287, which does not contemplate such an application at all.

[100] *N. G. Chandavarkar*, for the Opponent, showed cause:—Technically no doubt section 278 does not apply, because the property was not attached; but although not attached, yet as it was directed to be sold in execution of a decree, it should be regarded as practically attached for the purpose of a sale, and that being so the claimant's application should be dealt with. If property to which claims are made, is put up for sale, the purchaser runs the risk of buying what may turn out to be property which does not belong to the judgment-debtor, and which ought not to be sold. This inconvenience ought to be prevented by the Court.

Sargent, C. J.:—We agree with the opinion expressed by the Calcutta High Court in *Deefholts v. Peters*, I. L. R., 14 Cal., 631, that proceedings by way of claim as provided by section 278 of the Civil Procedure Code are not applicable to a case of *this* kind. As to section 287, it has no application to a case of this nature. The Subordinate Judge has acted, therefore, without jurisdiction. The rule must be made absolute, and the Subordinate Judge's order discharged. Costs of this application to be paid by the opponent.

Rule made absolute.

NOTES.

[The decisions in (1905) 1 N. L. R., 142; (1898) 12 C.P.L.R., 73; (1904) 6 Bom. L.R., 1043 were similar. See also (1912) 13 I.C., 563.]

The 18th January, 1893.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Gulabsingji and others.....(Original Plaintiffs) Appellants

versus

Lakshmansingji.....(Original Defendant) Respondent.*

*Court Fees Act, VII of 1870, Sec. 7, Cl. 4 (c)—Act VII of 1887, Sec. 8—Stamp
—Consequential relief—Valuation of suit—Injunction—Talukdari Act,
Bombay Act VI of 1888, Sec. 11—Jurisdiction.*

Where plaintiffs sued for a declaration that they were entitled to share in certain talukdari estates and for an injunction to restrain defendant from cutting and removing timber from certain forests, or, if the injunction was not granted, for an order to defendant to keep a correct account of the timber removed, the First Class Subordinate Judge rejected the claim for want of jurisdiction.

Held, that the suit was one for a declaration and consequential relief under section 7, clause 4 (c) of the Court Fees Act, and that as the claim was valued at [101] Rs. 230 only, the appeal lay under Act VII of 1887, section 8, to the District Court.

An injunction is in the nature of consequential relief.

APPEAL from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

Plaintiffs sued for a declaration of their shares in certain talukdari estates, and for a temporary injunction to restrain defendant from cutting and removing timber from certain forests, or, in the alternative, for a direction to defendant to keep correct and proper accounts of timber removed from those forests.

Defendant contended (*inter alia*) that the Court had no jurisdiction to try the suit.

The First Class Subordinate Judge held that as plaintiff's object in bringing the suit was to get division by actual partition, they must apply, in the first instance, to the Talukdari Settlement Officer under section 11 of Bombay Act VI of 1888, and dismissed the suit.

From this decree plaintiffs preferred an appeal to the High Court.

Inverarity (with *Ganpat Sadashiv Rao*) for Respondent (defendant) :—There is a preliminary objection to this appeal. I contend that the appeal lies not to this Court, but to the District Court. The plaintiffs sue for a declaratory decree and consequential relief. The suit falls within section 7, clause 4, sub-sections (c) and (d) of the Court Fees Act, VII of 1870. Under this section the plaintiff is, no doubt, at liberty to put his own valuation upon the reliefs sought. But the valuation will determine the jurisdiction of the Court. Under section 8 of Act VII of 1887, in a suit like the present, the valuation for purposes of Court fees and the valuation for purposes of jurisdiction are the same. The plaintiffs value their claim at Rs. 230. This valuation should be taken for purposes of jurisdiction as well as Court fees. The appeal, therefore, lies to the District Court.

He referred to *Bhagvantrai v. Mehta Bajurao*, ante p. 40.

[102] *Jardine* (with *Gokuldas K. Parekh*) for Appellants (plaintiffs) :—The objection that no appeal lies to the High Court, practically amounts to saying

* Appeal, No. 138 of 1892.

that the First Class Subordinate Judge's Court had no jurisdiction to try the original suit, and the objection about jurisdiction having not been raised in the original Court, it is not open to the respondent to say in this Court that no appeal lies.

This is not a case, under sub-clause (c), clause 4, section 7 of Act VII of 1870, of a suit to obtain a declaratory decree where consequential relief is prayed. A prayer for partition which necessarily follows from the declaration would be consequential relief, but not a prayer for injunction; if a declaration is made in plaintiff's favour, his right to injunction would not follow as a matter of course. In a suit for a declaration the Court fees duty is fixed, and not *ad valorem*. The suit would not have been held bad if the prayer for injunction had been omitted. If the prayer in the plaint had been limited to a mere declaration of title, there would have been no objection to this appeal. By adding the further prayer for injunction, this Court would not become deprived of its jurisdiction.

Sargent, C. J. :—This is a regular appeal from the First Class Subordinate Judge of Ahmedabad, and a preliminary objection has been taken that the appeal does not lie to this Court, the value of the suit for the purpose of determining the jurisdiction of this Court to hear the appeal being, it is contended, only Rs. 230, *viz.*, the sum at which the plaintiffs have valued the relief sought in their plaint.

In *Khushalchand v. Nagindas*, I. L. R., 12 Bom., 675, in a suit for account and a decree for the balance to be found due where the plaintiff had valued the relief at Rs. 510, it was held that the appeal lay to the District Court, and not to the High Court. This decision was come to independently of the effect of section 8 of Act VII of 1887. In *Bhagvantrao v. Mehta Bajurao*, *ante*, p. 40, the High Court, in a similar suit, followed *Khushalchand v. Nagindas*, I. L. R., 12 Bom., 675, pointing out at the same time that the law so laid down had already been embodied in section 8 of Act VII of 1887, when that decision [103] was passed. The question is whether that section is applicable to the present suit.

It was contended for the respondent that it is a suit for "a declaratory decree where consequential relief is prayed" as contemplated by section 7, clause 4, sub-clause (c) of Act VII of 1870. It was urged for the appellants that an injunction is not such "consequential" relief as is intended by that expression in sub-clause (c). An "injunction" is undoubtedly in the nature of consequential relief, and the following sub-clause (d) shows that the Legislature considered it was a form of relief which might be valued in a suit which asked for it. Moreover, in the present case the relief sought is not merely an injunction, but, in the alternative, for an account of the timber which defendant might cut before the actual partition. We think, therefore, that the above rule applies to the present suit, and that the relief having been valued at only Rs. 230, the appeal lay to the District Court, and we must, therefore, return the appeal for presentation in that Court. Appellants to pay the costs incurred in this Court.

Appeal returned for presentation to proper Court.

NOTES.

[This was followed in (1895) 20 Bom., 736 at 741; (1895) 20 Bom., 265, (1903) 5 Bom. L.R., 195; (1903) 6 O.C., 255; (1907) 11 C.W.N., 705; 6 C.L.J., 427.]

[18 Bom. 103]
APPELLATE CIVIL.

The 19th January, 1893.

PRESENT :

SIR CHARLES SARGENT KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Baba Kakaji Shet Shimpi.....(Original Plaintiff) Appellant

versus

Nassaruddin valad Aminuddin Kazi
and another.....(Original Defendants) Respondents.*

Kazi, office of—Hereditary office—Watan—Watandars Act (Bombay Act III of 1874), Sec. 9—Mortgage.

The office of Kazi is not an hereditary office, unless perhaps by special custom of the locality. Where such a custom is not established, property attached to the [103] office is not watan property, and the Collector has no power to make an order with respect to it under section 9 of the Watandars Act (Bombay Act III of 1874).

Jamal valad Ahmed v. Jamal valad Jallal, I. L. R., 1 Bom., 633, and *Dardsha v. Ismalsha*, I. L. R., 3 Bom., 72, followed.

A Resolution of Government empowering a Collector to levy full assessment from the person other than the grantee in possession of land granted for public service does not authorise him to order the delivery of possession of the land to the grantees.

SECOND APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge, A. P., at Nasik.

On the 30th May 1869, the first defendant mortgaged with possession to the plaintiff's father certain property attached by *sanad* to the office of Kazi in the villages of Wani and Sewali in the district of Nasik. The mortgagee continued in possession until 1883, but in that year the property was restored to the first and second defendants, who were Kazis in those villages in pursuance of an order of the Collector in exercise of the power vested in him by the Watan Act (Bombay Act III of 1874), section 9.

The plaintiff's father died, and the plaintiff sued to recover the mortgage-debt. He prayed for the sale of the mortgaged properties, or for possession of them until the amount of debt was paid.

The defendants pleaded (*inter alia*) that they had been put into possession by the Collector under the Act, and they contended that the property in question was service *inam* property, and as such inalienable without the sanction of Government.

[105] The Subordinate Judge dismissed the suit. He held that he had no power to interfere with the Collector's order. On appeal the decree was confirmed.

* Second Appeal, No. 910 of 1891.

† Section 9 of the Watandars Act (Bombay Act III of 1874)—

9. *Clause 1.*—Whenever any watan or any part thereof, or any of the profits thereof, whether assigned as remuneration of an officer or not, has or have, before the date of this Act coming into force, passed otherwise than by virtue of, or in execution of a decree or order of any British Court and without the consent of the Collector and transfer of ownership in the revenue records, into the ownership or beneficial possession of any person not a watandar of the same watan, the Collector may, after recording his reasons in writing, declare such alienation to be null and void, and order that such watan or any part thereof, or any of the profits thereof, shall from the date of such order belong to the watandar previously entitled thereto, and may recover and pay to such watandar any profits thereof accordingly.

Clause 2.—If such part of a watan be land, it shall be lawful for the Collector, instead of transferring the possession of the land, to demand and recover the full rent ordinarily paid by tenants of land of similar description in the same locality, and the amount so recovered shall be considered as the profits. The decision of the Collector shall be final.

The plaintiff preferred a second appeal.

Daji Abaji Khare, for the Appellant (Plaintiff):—The question is whether a Kazi is a watandar under the Watan Act. The appointment of Mahomedan law officers was made under Regulation XXVI of 1827. But that Act was repealed by Act XI of 1864, and thereupon Mahomedan officers ceased to be officers of Government. A Kazi is now no longer an officer connected with the civil administration of the country, and is, therefore, not a watandar under the Watan Act (III of 1874). He is not an hereditary officer under the Act—*Jamal valad Ahmed v. Jamal valad Jallal*, I. L. R., 1 Bom., 633; *Daudsha v. Ismalsha*, I. L. R., 3 Bom., 72.

To be a watandar under that Act, payment must be received from Government for service performed. If, then, the defendants are not watandars under the Act, the Collector was wrong in restoring the mortgaged property to them, and section 9 of the Act does not afford them protection.

Govardhanram M. Tripathi, for the Respondents (Defendants):—A Kazi is connected with the civil administration of the country—*Muhammad Yusub v. Sayad Ahmad*, 1 Bom. H. C. Rep., Appx., p. xviii. The question here is as to the property and not the office of a Kazi. It is within the cognizance of the Collector to determine whether a property is watan or not, and he having once held that the property in dispute is watan, it is inalienable, and consequently not liable to the appellant's mortgage.

Sargent, C. J.:—The judgments of both the Courts below proceed on the assumption that the Collector's order was made under the Watandars Act of 1874. The decisions in *Jamal valad Ahmed v. Jamal valad Jallal*, I. L. R., 1 Bom., 633, and *Daudsha v. Ismalsha*, I. L. R., 3 Bom., 72, are, however, conclusive that the office of Kazi is not an hereditary one, unless perhaps by a special custom of a locality, and there is no evidence of any such established custom in this case. The [106] Watandar's Act, III of 1874, relates to watan property, which by that Act is defined to be "property acquired or assigned for providing remuneration for the performance of the duty appertaining to an hereditary office." The properties in question which, by the *sanad*, were attached to the office of Kazi were, therefore, not watan property under the Act, and not such as the Collector had power to recover from the defendants under section 9 of the Watandars Act.

However, an examination of the Collector's order shows that he acted under a Resolution of Government (No. 512 of 1882)*, which he considered entitled him to order the lands to be handed over to the defendants on the ground that they had been granted for public service. That Resolution may have enabled such lands to be resumed by the Collector, but it is plain from the subsequent Resolution of Government on 25th August 1883† that by the "resumption" in

* Bombay Government Resolution No. 512 of 1882.—Bombay Act III of 1874 does not appear to be applicable to village servants useful to the community. All the *sanads* which have been issued to such servants prohibit alienation of the property to which they relate. Under the terms of the settlement, land which ceases to be held as remuneration for service to the village community may be resumed. (Nairne's Hand Book, p. 526.)

† No. 6310.—Revenue Department, 25th August 1883. RESOLUTION.—Government concur with the Commissioner, Central Division, and the Remembrancer of Legal Affairs that the terms of the settlement made in the case of village servants useful to the community should be held applicable to all cases in which their service lands have ceased to constitute the remuneration of such servants, and that the lands should be resumed at once irrespective of the date of alienation.

2. It should be borne in mind that by resumption in such instances is only meant the levy of full assessment from the person in occupation other than the original grantee or his descendants. The present holders should, therefore, be allowed to remain in possession on payment of the full assessment to which the lands are liable.

that Resolution was only meant the levying of full assessment from the person in occupation [107] other than the grantee and his descendants. The Collector had, therefore, no legal authority to make the order for the handing over of the properties to the defendants.

We must, therefore, reverse the decree of the Court below, and direct that the lands in question be restored by the defendants to the plaintiff as mortgagee. Appellant to have his costs throughout.

Decree reversed.

NOTES.

[See also (1896) 21 Bom., 733 at 737.]

[18 Bom. 107]

APPELLATE CIVIL.

The 23rd January, 1893.

PRESENT :

MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

Abu Bakar Saiba and another..... (Original Defendants) Appellants

versus

Venkatramana Vishveshvar..... (Original Plaintiff) Respondent.*

Landlord and tenant—Notice to quit—Plea of permanent tenancy.

The plaintiff sued to eject the defendants from certain land. The defendants pleaded that they were permanent tenants under a lease granted to their ancestor by the plaintiff's grandfather in 1805. The Court of First Instance awarded the plaintiff's claim. On appeal, the District Judge held that the lease on which the defendants relied was one determinable on the grantee's death, but as the grantee's heirs (the defendants) had continued in possession paying the stipulated rent, they were entitled to a reasonable notice to quit. The District Judge accordingly passed a decree, directing the defendants to vacate the land at the expiry of six months from the date of the decree.

Held, that the District Judge could not, in his judgment, give the notice which the plaintiff was bound to give to his tenants. Plaintiff's suit must fail for want of notice.

SECOND APPEAL from the decision of Arthur H. Unwin, District Judge of Kanara in Appeal No. 47 of 1891.

The plaintiff sued to eject the defendants from the land in dispute.

The defendants pleaded (*inter alia*) that they were permanent tenants, holding under a lease granted by the plaintiff's grandfather in 1805 to their ancestors.

The lease contained the following stipulation on the part of the lessor:—"I will take back the land when you yourself surrender it. I for my part will not ask you to quit."

[108] The Subordinate Judge held that the lease in question was a lease for life only, and that on the death of the lessee the tenancy came to an end. He, therefore, passed a decree, awarding possession of the land to the plaintiff.

3. If the original holders or their descendants have thought proper to alienate their lands in which they had only a life interest, and have thus deprived themselves of the remuneration provided for the performance of their duties, they themselves are to blame for their own action, and the Governor in Council does not consider them to be entitled to any consideration. The full assessment to be levied in the case of these alienations should accordingly be credited to Government.

* Second Appeal, No. 774 of 1891.

On appeal, the District Judge was also of opinion that the lease was one for life, determinable on the death of the grantee. But he held that as the grantee heirs had continued in possession paying the stipulated rent, they were entitled to a reasonable notice to quit. He, therefore, amended the decree of the Court of First Instance by directing that the defendants should surrender the land in suit to the plaintiff at the expiry of six months from the date of the decree.

Against this decision the defendants appealed to the High Court.

Manekshah Jehangirshah for Appellants :—Plaintiff has not given us any notice to quit. He is not, therefore, entitled to recover. The District Judge has no power to do that which the plaintiff was bound to do. The plea of permanent tenancy which we had set up does not dispense with the necessity of a proper notice—*Vithu v. Dhondi*, I. L. R., 15 Bom., 407. That case is conclusive on the point.

Shamrao Vithal and N. G. Chandavarkar for Respondents.

Candy, J. :—The District Judge held that defendants 8 to 13 were entitled to notice, and the plaintiff has taken no objection to that ruling. The District Judge, however, has in his judgment given the notice which he thought the plaintiff was bound to give his tenants. This he could not do. On the authorities collected in *Vithu v. Dhondi*, I. L. R., 15 Bom., 407, we must reverse the decree of the District Judge and reject the claim. All costs on plaintiff.

Decree reversed.

NOTES.

[Notice to quit or disclaimer of title, must have been given or made before the suit, in order to sustain a suit in ejectment on the ground of determination or forfeiture :—(1895) 20 Bom., 759 ; (1896) 6 M.L.J., 59.]

[109] APPELLATE CIVIL.

The 23rd January, 1897.

PRESENT :

MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

• Parshotam Vishnu.....(Original Plaintiff) Appellant
versus

Nana Prayag.....(Original Defendant) Respondents.*

Registration Act III of 1877, Sec. 17 (d)—Lease—Lease for life of the lessee—Registration.

A lease of immovable property for the life of the lessee is a lease for a term exceeding one year. It, therefore, requires registration.

SECOND APPEAL from the decree of Khan Bahadur N. N. Nanavati, First Class Subordinate Judge, with Appellate Powers, of Dhulia, confirming the decree of Rao Sahib D. S. Sapre, Second Class Subordinate Judge of Nandurbar in Suit No. 994 of 1889.

The plaintiff sued to recover possession of a piece of land, alleging that it was leased by him to Nana Prayag for his life under an agreement dated 25th March 1878 ; that in violation of this agreement Nana had assigned 7 gunthas of this land to defendant No. 2, and that after Nana's death his heir, defendant No. 1, refused to vacate the land.

The agreement, on which the plaintiff relied in support of his claim, provided as follows:—

"I (the lessee) shall continue to pay each year Re. 0-12-5 to you in the month of February, and I shall enjoy the said land as long as I live."

The Subordinate Judge held that the agreement in question was compulsorily registrable, being a lease falling under sub-section 1, clause (d) of section 17 of the Indian Registration Act III of 1877; that as it was not registered, it was inadmissible in evidence; and that as it was the foundation of the plaintiff's case, he must fail. He, therefore, rejected the plaintiff's claim.

This decision was confirmed by the Lower Appellate Court.

The plaintiff thereupon preferred a second appeal to the High Court.

Narayan Vishnu Gokhale for Appellant.

Daji Abaji Khare for Respondent.

[110] **Candy, J.**:—We consider that a lease for the life of the lessee is lease for a term exceeding one year, as it entitles the lessee to hold for more than that period if he live so long. It is not a lease terminable at the end of year or at the option of the lessor. It, therefore, requires registration. We confirm the decree, with costs.

Decree confirmed.

[18 Bom. 110]
APPELLATE CIVIL.

The 23rd January, 1893.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Dodhu and others.....(Original Defendants Nos. 12 to 18) Appellants
versus

Madhavrao Narayan Gadre and others.....(Original Plaintiff
and Defendants Nos. 1 to 11).*

Landlord and tenant—Suit for possession—Denial of landlord's title—Plea of permanent tenancy—Notice to quit—Yearly tenant—Practice—Procedure—

Second appeal—Point taken for first time on second appeal—Specific performance, suit for—Parties made defendants who were not parties to the agreement.

The plaintiff sued the jaghirdars of a certain village (defendants Nos. 1 to 11) and certain of their tenants (defendants Nos. 12 to 18) for specific performance of an agreement made between the plaintiff and the jaghirdars, by which the jaghirdars agreed to give up to the plaintiff possession of certain lands, which were in possession of the tenants (defendants Nos. 12 to 18). The jaghirdars (defendants Nos. 1 to 11) pleaded that they were unable to give possession, as the tenants (defendants Nos. 12 to 18) were permanent tenants and refused to quit the land. The tenants (defendants Nos. 12 to 18) put in a separate defence, also alleging that they were permanent tenants of the jaghirdars. The Lower Appellate Court held that the tenants (defendants Nos. 12 to 18) were yearly tenants and did not hold in perpetuity, and that the jaghirdars (defendants Nos. 1 to 11) had power to eject them. That Court, therefore,

* Second Appeal, No. 394 of 1891.

passed a decree for the plaintiff, for specific performance of the agreement as against the jaghirdars (defendants Nos. 1 to 11) and for possession as against the other defendants (Nos. 12 to 18). The latter defendants (the tenants) appealed to the High Court. They there contended that if they were yearly tenants as held by the decree of the lower Court they could not be dispossessed without notice to quit, and that no such notice had been given.

Held (1) that the objection was good, and that no decree against the tenants (defendants Nos. 12 to 18) could be made in favour of the plaintiff, and that he was only entitled to a declaration that the said defendants were mere yearly and not permanent tenants.

[111] (2). That the tenants (defendants Nos. 12 to 18) had claimed to be permanent tenants before the suit was filed and at that time they were not tenants of the plaintiff but of the jaghirdars (defendants Nos. 1 to 11). Under the circumstances that claim could not be taken to have worked a forfeiture of their tenancy as a denial of their landlord's title, or in any case it must be deemed to have been waived by the jaghirdars (defendants Nos. 1 to 11). The plaintiff, therefore, could not rely upon it as an answer to the defendants' contention that a notice to quit was necessary.

(3). That the objection as to the necessity of notice to quit was one which might be taken in second appeal.

Held, also, that an objection that certain of the defendants should not have been made parties to a suit for specific performance, because they were not parties to the agreement, could not be taken for the first time in second appeal, as it only involved a question of practice.

SECOND APPEAL from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Dhulia with appellate powers.

Suit for specific performance of an agreement and for possession of land.

The plaintiff sued for specific performance of an agreement by which defendants Nos. 1 to 11, Bhivrao Govind and others, who were jaghirdars, agreed to grant to plaintiff a *sanad* in respect of two pieces of land and to deliver possession to him of the said lands, and that, in the event of the lands being found to contain less than 70 bighas, to give other land of the same quality in accordance with the agreement. The plaintiff also charged defendants Nos. 12 to 18, who were tenants of the jaghirdars, with colluding with them, and prayed that possession be given him by all the defendants.

Defendants Nos. 1 to 11, Bhivrao Govind and others, answered that they could not give the plaintiff the lands mentioned in the agreement, as defendants Nos. 12 to 18 were permanent tenants and were reluctant to quit, but that they were ready to give the plaintiff other land in lieu of those mentioned in the agreement.

Defendants Nos. 12 to 18 pleaded that the land called Hari Mali Vale had been granted in permanent tenancy to them by the father of defendants Nos. 1 to 8, and that as regards the other piece of land it belonged to defendants Nos. 13 to 18, and that the jaghirdars were only entitled to assessment.

[112] The Subordinate Judge found that the agreement relied on by the plaintiff was proved, and also that defendants Nos. 12 to 18 were entitled to hold the land as long as they paid assessment.

On appeal by the plaintiff the Court found that the jaghirdars had the right to eject the defendants Nos. 12 to 18, and passed a decree for specific performance as against defendants Nos. 1 to 11 and for delivery of possession as against defendants Nos. 12 to 18.

Defendants Nos. 12 to 18 preferred a second appeal.

Jardine (with Ganpat Sadashiv Rao) for the Appellants (defendants Nos. 12 to 18):—As these defendants were not parties to the agreement of which the specific performance is sought, they were wrongly joined in the suit. A suit for specific performance of an agreement cannot lie against a stranger.

[SARGENT, C. J.:—That objection was not taken in either of the lower Courts.]

Our next point is that the Judge found these defendants to be yearly tenants, and that being so the suit ought to have been dismissed, so far as they are concerned, for want of notice to quit—*Vithu v. Dhondi*, I. L. R., 15 Bom., 407.

Mahadeo Chhmnaji Apte, for the Respondent (plaintiff):—The objections taken have been now raised for the first time. They cannot be taken in second appeal. In the lower Courts the appellants alleged a permanent tenancy. Such a plea being a direct denial of the landlord's title, no notice to quit can be held necessary. In the case relied on, the question of permanent tenancy was raised after suit. Here the appellants disputed the plaintiff's title to possession before the suit was filed.

Sargent, C. J.:—This was a suit by the plaintiff for specific performance of an agreement by which the defendants Nos. 1 to 11 agreed to grant plaintiff a *sanad* in respect of certain lands in their *jaghir* and to deliver possession to him of the said lands, and in the event of the lands being found to contain less than 70 highas, to give other land of the same quality in accordance with the agreement. The plaintiff also charged defendants Nos. 12 to 18, who were tenants of the jaghirdars, with colluding with [113] them and prayed that possession be given him by all the defendants.

The defendants Nos. 1 to 11 by their written statement said they could not give the plaintiff the lands mentioned in the agreement, as defendants Nos. 12 to 18 were permanent tenants and were reluctant to quit, but that they were ready to give the plaintiff other lands.

The defendants Nos. 12 to 18 pleaded that the land Hari Mali Vale had been granted in permanent tenancy to them by the father of defendants Nos. 1 to 8, and that as regards the other piece of land it belonged to defendants Nos. 12 to 18, and the jaghirdar was only entitled to assessment. The agreement was found proved by the Subordinate Judge, who also held that the defendants Nos. 12 to 18 were entitled to hold the lands as long as they paid assessment. On appeal by plaintiff the Court found that the jaghirdar had the right to make the defendants Nos. 12 to 18 quit the land, and passed a decree for specific performance as against the defendants Nos. 1 to 11 and for delivery of possession against the defendants Nos. 12 to 18.

Defendants Nos. 12 to 18 now appeal on the authority of *Javherbai v. Haribhai*, I. L. R., 5 Bom., at p. 577, and have taken the objection that defendants being strangers to the agreement, they could not be made parties to a suit for specific performance; this objection, however, was not taken in either of the Courts below, and as it only involves a question of practice cannot be taken for the first time on second appeal. It has also been objected to the decree that notice to quit not having been given to the defendants Nos. 12 to 18, who have been found by the lower Court of appeal to be yearly tenants, a decree for possessor could not be made against them. This objection raises a question on which there has been some difference of judicial opinion and decision. It was urged, indeed, that it could not be taken for the first time on second appeal. But it has been already decided, and we think rightly, that it can be so taken—*Vithu v. Dhondi*, I. L. R., 15 Bom., 407, following *Haji Sayad v. [114] Venkta*, I. L. R., 15 Bom., 415; *Abdulla v. Subbarayyar*, I. L. R., 2 Mad., 346, and *Subba v. Nagappa*, I. L. R., 12 Mad., 353. In *Vithu v. Dhondi*, I. L. R., 15 Bom., 407, where the effect of a defendant setting up a permanent tenancy by his written statement is fully discussed, it was pointed out that, according to English law, the plaintiff could not rely on a disclaimer of title operating as a forfeiture of the tenancy, when the disclaimer had been made subsequent to the day mentioned in the

writ of ejectment as the time when the plaintiff was entitled to possession, and that on general principles the same rule would apply where the plaintiff, in this country, filed his suit before the disclaimer took place. In the present case, however, although there is no distinct finding on the question, it can scarcely be doubted that the defendants Nos. 12 to 18 had set up a permanent tenancy as the ground of their objection to quit before the suit was filed. Assuming this to have been so, it remains to consider what would be the effect of that claim being set up by the tenants. It is to be remarked that they were not the plaintiff's tenants when they set up the claim, and so far as the defendants Nos. 1 to 11 are concerned it cannot, under the circumstances of the case, be taken to have worked a forfeiture of the tenancy, or in any case it must be deemed to have been waived by defendants Nos. 1 to 11.

We are of opinion, therefore, that no decree for possession as against defendants Nos. 12 to 18 can be made in favour of the plaintiff in this suit, and that he is only entitled to a declaration that the said defendants are only yearly and not permanent tenants. We must, therefore, reverse the decree, so far as it directs the defendants Nos. 12 to 18 to deliver possession to plaintiff, and direct that a declaration be inserted in the decree that the said defendants are only in possession of the land as yearly tenants. In other respects the decree is confirmed. Appellants to have their costs of this appeal.

Decree partially reversed.

NOTES.

[An objection that there was no notice given to quit is fatal to the suit and may be raised for the first time in appeal:—(1893) 18 Bom., 256; (1895) 20 Bom., 759; (1900) 24 Bom., 426; (1901) 26 Bom., 360; (1894) 17 All., 45; (1909) 36 Cal., 927; (1909) 3 I.C., 336.]

[115] ORIGINAL CIVIL.

The 10th August, 1893.

PRESENT :

MR. JUSTICE STARLING.

Kanji Bavla.....Plaintiff

versus

Arjun Shamji and others.....Defendants.

Caste-matter.—Custom of caste.—Funeral ceremonies.—Right to assistance of fellow-members of caste.—Refusal to assist.—Cause of action—

Suit not maintainable.

The plaintiff, a Hindu and *kharva* by caste, alleged in his plaint that, pursuant to a usage of his caste, he, on the occasion of his child's death, called upon the defendants, who were his caste-fellows, to assist him in removing the dead body and performing caste ceremonies incidental thereto; that the defendants refused to do so, and induced other members of the caste to refuse also; that, in consequence thereof, the plaintiff was injured in his caste-status, and he prayed for a declaration that the defendants' acts were unlawful, and that he was lawfully entitled to exercise and enjoy all his customary caste-rights and privileges; and also for damages and for an injunction restraining the defendants from preventing other members of the caste from recognising him and treating him as a member of the caste.

Held, that the plaint disclosed no cause of action, and must be rejected.

In chambers. The plaintiff presented a plaint alleging that he was a member of the *kharva* caste of Hindus in Bombay; that it was a custom in the caste that, in case any death took place in the house of any member of the caste,

such member was entitled to call upon his caste-fellows to assist him in the removal of the dead body to the burial-ground and to take part in performing the customary caste ceremonies connected with the funeral; that in January 1893, his child died, and he called upon the defendants, two of whom were trustees of the caste, to aid him and take part in the customary performance of caste rites, but they maliciously and without any cause refused to do so, and induced others also to refuse, and that, in consequence thereof, the plaintiff suffered in his *status* and character as a member of the caste, and was treated as if he had been out-casted. He prayed for a declaration: (1) that the acts of the defendants were illegal, and contrary to the usages of the caste; (2) that he was still a member of his caste, and had done nothing to forfeit the rights and privileges of his caste, and was lawfully entitled in every respect to exercise and enjoy all his customary caste rights, and reciprocate the same to his fellow-caste-men. He further prayed for damages and for an injunction restraining the defendants from [116] preventing other members of the caste from recognising the plaintiff as a member of the caste.

On presentation of the plaint to the Judge in chambers (STARLING, J.), objection was taken that it disclosed no cause of action. Subsequently counsel appeared to argue the point.

Vicaji for the Plaintiff:—The plaintiff complains that he has been treated as an out-caste by the defendants, who are fellow-members of his caste, without cause, and without enquiry, and out of malice. He sues, therefore, to have it declared that he has not lost caste, and that the defendants' acts are unjustifiable and contrary to the usages of the caste. Such a suit is one of a civil nature and cognisable by Courts of law. In the *Mofussil* of Bombay it would be governed by Regulation II of 1827, section 21. That enactment expressly provides for "the trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff arising from the illegal act or unjustifiable conduct of the other party." The same Regulation declares that "no interference on the part of the Court in caste-questions is hereby warranted." The present suit is not a case of such interference; for *interference* has been held not to include cases in which "evidence of the customary law of a caste" is taken, or where the law of the caste has been recognised. The Courts are free to deal "with a caste-question where the membership and the character of a member have been unjustly injured"—*Pragji Kalan v. Govind Gopal*, I. L. R., 11 Bom., 534. The Madras High Court has held that "a question of caste-status in respect of a caste institution" is a right of "a civil nature and within the [117] cognisance of the Civil Courts"—*Venkatachalapati v. Subbarayadu*, I. L. R., 13 Mad., 293. Loss of caste was held so far back as 1867 to be a civil wrong in *Gopal Gurain v. Gurain*, 7 Cal. W. R., 299, which was a suit for restoration to caste and damages for the cost of such restoration. In *Sonaram v. Obhoyram*, S. D. R., 1847, p. 106, the Courts held a suit to gain re-admission to caste maintainable. These cases are distinguishable from suits of the class

* Section 21, Regulation II of 1827:—

First—[The jurisdiction of the Civil Court shall extend to the cognisance of all original suits and complaints between natives and others (not British-born subjects) respecting the right to moveable or immoveable property, rents, Government revenues, debts, contracts, marriage, succession, damages for injuries and generally of all suits and complaints of a civil nature], it being understood that no interference on the part of the Court in caste questions is hereby warranted, beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party. (See also Schedule to Act XIV of 1869).

of *Raghunath v. Janardhan*, I. L. R., 15 Bom., 599, for the enforcement of sumptuary rights by plaintiffs to be invited to social entertainments.

Cur. adv. vult.

Starling, J. :—In this case the plaintiff, who is a member of the *kharva* caste, in his plaint alleges that by a custom of the caste a member thereof, in whose family a death has taken place, is entitled to call upon the other members of the caste, apparently without limitation in number and without regard to their place of residence, to come to his house and assist in the removal of the dead body to the burial-ground and to take part in performing the customary caste ceremonies incidental to the funeral. He further alleges that, on the 19th January 1893, on the death of a child, then a few days old, the defendants—two trustees and three members of the caste—refused to assist him in removing the dead body, and induced others of the caste to refuse also, in consequence of which the plaintiff and his family have suffered in their *status* and character, as the treatment they have received is such as would be meted out to those who were out-casted. He then asks that it may be declared that the aforesaid acts of the defendants were illegal and contrary to the usages of the caste; that he may be declared to be lawfully entitled to exercise and enjoy all his customary caste rights; that the defendants may be restrained from preventing other members of the caste from recognising the plaintiff as a member of the caste, and for damages.

When the plaint was first presented to me I refused to admit it until I had heard the attorney on the record, or counsel on the point, whether the plaint disclosed any cause of action cognizable by the Civil Courts. Accordingly Mr. Vicaji appeared and argued [118] that point. He cited Regulation II of 1827, section 21; *Pragji Kalan v. Govind Gopal*, I. L. R., 11 Bom., 534, which, however, involved a question of the right to caste property; *Gopal Gurain v. Gurain*, 7 Cal. W. R., 299, which was a suit for a declaration of the plaintiff's right to be restored to caste and for the cost of such restoration; and *Venkatachalapati v. Subbarayadu*, I. L. R., 13 Mad., 293, which was a suit for a declaration of the plaintiff's right to enter a certain portion of a *quasi*-public building, *viz.*, a Hindu temple. None of these cases seem to me to govern the present one, which, in my opinion, belongs to that class which has often been before the Courts, and in which relief has been constantly refused, *viz.*, where the plaintiff has sought a declaration that he is entitled to be invited to dinner with his fellow-castemen, and to insist upon their coming to dinner with him. I think this case is on all fours with that of *Sudharam v. Sudharam*, 3 Beng. L. R. (A. J.), 91, where the plaintiff had invited the defendants to a dinner party, which invitation they had accepted, but did not come. At the end of his judgment, *BAYLEY, J.*, after citing *Joy Chunder v. Ramchurn*, 6 Cal. W. R., 325 (Civ. Rul.), said: "No decree can be executed declaring a person's right to the membership of a society, as the effect of such a decree would be to require that other persons do accept the plaintiff's invitation and do partake of his food though against their will, and that they in their turn must give him similar invitations and dine with him whether they like to do so or not." This case was cited and followed in *Raghunath v. Janardhan*, I. L. R., 15 Bom., 599, wherein the case of *Shankar v. Hanma*, I. L. R., 2 Bom., 470, was also cited. I think these cases and the majority of the older cases, collected and reported in 3 Beng. L. R. (A. J.), 91 show that the present suit is not maintainable, as the decree to be of any effect would have to declare that all members of the *kharva* caste whom the plaintiff chose to call to his house on the occasion of a death in his family, must go, whether they

were willing or not; and that the defendants were never to state any reason to any of their fellow-members why they should not accept the plaintiff's invitations, and I fail to see how such a decree could be enforced.

[119] Consequently I shall follow the decision in *Sudharam v. Sudharam* 3 Beng. L. R. (A. J.), 91. If the defendants are in fault at all it is because they have broken some social rule of the caste, and in such a case it is to the caste the plaintiff must go for redress. There is no question of property involved, nor can I see that the defendants have by their alleged acts slandered the plaintiff so as to give him a right to sue for damages. I, therefore, reject the plaint.

Attorney for the Plaintiff:—Mr. J. C. Cama.

NOTES.

[It was held that no cause of action was disclosed in a suit for a declaration that an excommunication was invalid, and for restoration to the social privileges of the caste. — (1901) 26 Bom., 174.]

[18 Bom. 119] ORIGINAL CIVIL.

The 15th and 22nd September, 1893.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Kathiawar Trading Company, Limited, in Liquidation..... (Original Plaintiffs) Appellants

versus

Virchand Dipchand..... (Original Defendant) Respondent.*

Company—Directors of company—Liability of directors for funds of company applied in transactions ultra vires—Dealing in shares of other companies—

State demand—Limitation—Limitation Act (XV of 1877), Sec. 10.

The plaintiff company was formed in 1864. By its memorandum of association its object was declared to be commission agency and general trading in cotton and also in goods and commodities suited for market in the interior of India. The memorandum contained the following words:—"If found desirable, the company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable." The company went into liquidation in 1867. In April 1890, the present suit was filed against the defendant, who had been one of the directors of the company, and it was alleged that after the formation of the company the defendant and his co-directors had carried on speculative dealings in shares of other companies and had used the funds of the company for this purpose, which was not warranted by the memorandum of association. The plaintiffs alleged that their dealings, which were duly set forth in their plaint, had resulted in a heavy loss to the company, and they now sought to recover from the defendant the sum of Rs. 3,37,700-13-5. There had been originally five directors of the company, but at the date of suit two of them were dead and two had become insolvent. The plaint was filed in April 1890.

Held, (affirming the decision of PARSONS, J.) (1) that the memorandum of association did not justify the directors of the company in dealing in shares of other companies, and that the transactions complained of by the plaintiffs were *ultra vires*.

(2) That the directors were liable to replace the moneys of the Company which they had misapplied by applying them to a purpose which was *ultra vires*.

* Suit No. 187 of 1890.

[120] (3) That section 10 of the Limitation Act (XV of 1877) does not apply to directors of companies, the directors not being persons in whom the property of the company is vested as contemplated by that section.

(4) That in any case the staleness of the demand was a valid defence to the action, the liquidators of the company having had full knowledge of the facts since the company went into liquidation, but no suit was filed until the expiration of twenty-three years.

SUIT to recover Rs. 3,37,700 from the defendant, who had been a director of the company.

The company was duly registered as a limited company on the 23rd June 1864, under Act XIX of 1857. Its capital was Rs. 12,50,000 divided into 125 shares of Rs. 10,000 each.

The company went into liquidation in 1867, and at the date of suit was still in liquidation (see para. 16 of the plaint, *infra*).

The following were the objects of the company as stated in the memorandum of association :—" Commission agency and general trading in cotton and other staple products to be procured, as far as possible, direct from the producers in Kathiawar, Gujarat, Marwar and other parts of the interior of this country ; disposing of them either in Bombay or shipping them to England ; commission agency and general trading in goods and commodities suited for market in the interior of India, introducing cotton *churkas* in the interior ; or erecting factories, establishment and agencies for trading purposes. If found desirable, the company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable."

The plaint after stating the above facts set forth that the directors of the company were Virchand Dipchand (the defendant), Bharnal Parbut, Juggivandas Hemji, Gopalrao Bulwant and Dowlatchand Ilukunchand, who, as such, were entrusted with, and had the management and control of, the funds of the said company.

The plaint then stated that after the formation of the company the said directors speculated with the company's funds in the purchase of shares in other companies and invested and applied large portions of the funds of the company in the purchase of such shares. It set forth, in detail, the various dealings complain-[121]ed of, which resulted in heavy losses to the plaintiff company, and then continued :—

"The plaintiffs say that the said purchases of shares and the application of the funds of the said company in manner aforesaid were wholly unauthorised by the memorandum and articles of association of the said company and were breaches of trust on the part of the said directors. The plaintiffs believe that some of the shares purchased as aforesaid were the shares of one or other of the said directors, and in particular the plaintiffs say that the said shares of the Imperial Banking and Trading Company, Limited, were purchased from the defendant.

"15. The plaintiffs also say that the said directors in the case of some of the said purchases when they had not moneys of the said company in their hands, sufficient to pay for the same, obtained money for that purpose on the credit of the said company.

"16. In consequence of the funds of the company having been applied as aforesaid, the said company was unable to meet its liabilities, and it was duly resolved to wind the same up voluntarily, and by an order on the 21st January 1867, it was ordered that the same winding up should be continued under the supervision of this Court. Pestonji Merwanji Narielwalla, the official liquidator of the said company, having been appointed to that office, by an order dated the 6th day of July 1866, is now winding up the affairs of the company.

"18. The plaintiffs submit that under the circumstances aforesaid the defendant is liable to repay to the plaintiffs the said sums aforesaid, amounting in all to Rs. 3,37,700-13-5 and interest thereon at the rate of 9 per cent. per annum from the said 21st January 1867."

The plaintiff company accordingly claimed to recover the said sum from the defendant. The suit was filed on the 2nd April 1890.

Of the five directors above mentioned, two (*viz.*, Bharmul Parbut and Dowlatchand Hukumchand) were dead at the date of the suit, and two (*viz.*, Juggivan Hemji and Gopalrao Bulwant) had become insolvent.

In his written statement the defendant admitted that the company traded in shares, and alleged that trading in shares was at the time one of the principal trades in Bombay, and seemed to be and was considered to be a profitable trade. He stated that some of the plaintiffs' transactions had resulted in loss and some in profit, and he submitted that the plaintiffs were not entitled to select exclusively those transactions in which there was a loss. He admitted all the transactions set forth in the plaint, which he said appeared in the company's books and were known to the liquidator in the year 1867 when the company went into liquidation. He denied all liability to the plaintiff company, and submitted that the said transactions in shares were not *ultra vires* of the company or of the directors. The concluding clauses of his written statement were as follows :—

"7. Neither the defendant or his co-directors ever concealed or attempted to conceal from any one that the plaintiff company had carried on the said share transactions as part of their business, nor had they any reason to do so, as they believed that such transactions were *intra vires* of the plaintiff company.

"8. This defendant says that this suit, brought twenty-three years after the plaintiff company went into liquidation, is barred by the Limitation Acts in force from time to time during that period."

At the hearing the following issues (*inter alia*) were raised :—

- (1) Whether the claim in this suit is barred by the law of limitation?
- (2) Whether, apart from the law of limitation, this claim is unsustainable as being a stale demand?
- (3) Whether the purchases of shares and the application of the funds of the company stated in the plaint, were unauthorised by the memorandum and articles of the company as alleged?

Lang (Acting Advocate General) and Scott for Plaintiffs.
Macpherson and Inverarity for Defendant.

The judgment of the Court (PARSONS, J.) was as follows :—

30th January 1893. PARSONS, J. :—(After stating the facts and referring to the pleadings his Lordship said) :

I will deal with the third issue first. It is contended for the defendant that the words in the third clause of the memorandum of association—"carry on such local trade as may seem profitable"—would include the purchase of the shares in question. I am not, however, able to assent to this contention. Speculative dealing in shares is not trade in the usual sense of the term, and the memorandum itself clearly shows that the trade of the company was to be in cotton and produce only, certainly not in shares. I find the third issue in the affirmative.

The first issue raises the question of limitation, and its decision depends upon whether section 10 of the Limitation Act (XV of 1877) applies to the case or not. It can do so only if the defendant as a director of this company was a person in whom property had [123] become vested in trust for some specific purpose. The point is not without authority. In *In re Oxford Benefit Building and Investment Society*, 35 Ch. D., 502, at p. 509, KAY, J., says : "It is settled by authorities which I cannot dispute, that (1) directors are quasi-trustees of the

capital of the company, (2) directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up * * * and (5) such an act is a breach of trust and the remedy is not barred by the statute of limitation." In *In re Sharpe; In re Bennett, Masonic and General Life Assurance Company v. Sharp*, L. R. (1892) 1 Ch., 154, at p. 167, LINDLEY, L.J., says: "A director of a company is certainly not a mere agent. It is his duty, amongst other things, to protect the company and to enforce its rights even against himself, and the conflict between his interest and his duty when he has misapplied the company's money prevents the statute of limitations from applying to an action brought against him by the company in order to recover such money;" and I take it from Buckley in his work on Companies, pp. 495 to 497 (6th Ed.), that directors are undoubtedly trustees of the powers entrusted to them as between themselves and the shareholders, for the assets of the company are entrusted to them to be applied for certain defined objects, and they are responsible as for a breach of trust if they apply them to other objects. There can, therefore, I think, be no doubt that section 10 does apply to the present suit; for, as ruled by their Lordships of the Privy Council in *Balwant Rao Bishwant v. Purun Mal*, L. R., 10 Ind. Ap., 90, the expression "for the purpose of following in his or their hands such property" means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trust in question it may be recovered without any bar of time from the hands of the persons indicated in the section. I find the first issue in the negative.

The second issue raises the question of staleness of demand. The principle and application of the doctrine of laches is set out most clearly in the judgment of Sir BARNES PEACOCK in the case of *Lindsay Petroleum Co. v. Hurd*, L. R., 5 P. C., 221. In his judgment [124] (p. 239) he says: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." The same doctrine is discussed in the cases of *Erlanger v. New Sombrero Phosphate Co.*, 3 Ap. Ca. at p. 1279, and *In re Mammoth Copperopolis of Utah*, 50 L. J., (Ch.), 11.

A consideration of those cases and of the remarks also in the case *In re Sharpe*, L. R. (1892) 1 Ch., 154, leads me to the conclusion that if there ever was a case to which the principle ought to be applied, the present is such a one; for here the dealings were perfectly open and above board, they were fully set out in the books of the company and must have been known to the shareholders and to all the liquidators since the winding up, and yet the suit is not brought until after the expiration of twenty-four years. There is no allegation of fraud, and the directors of this company were only doing what in those times was universal, and are not shown to have been actuated by any other motive than desire for the welfare and benefit of the company. It seems to me that

the length of the delay in the present case and the nature of the acts done during the interval and the changed circumstances of the defendant would make it very inequitable and unjust now to award the [125] claim. I find the second issue in the affirmative, and dismiss the suit, but without costs.

The plaintiffs appealed, on the ground that the Judge was wrong in holding—

- (1) that the alleged staleness of the claim disentitled them to a decree;
- (2) that the doctrine of laches had any application to the case;
- (3) that the delay and the nature of the acts done during the interval and the changed circumstances of the defendant would render a decree for the plaintiffs unjust and inequitable.

The defendant also filed cross objections to the decree. He contended that the Judge erred (1) in not holding that the suit was barred by limitation; (2) in holding that the words "local trade" in the memorandum and articles of association of the company did not include dealing in shares.

Lang (Acting Advocate General) and *Scott* for the Appellants (plaintiffs):—The defendant was one of the directors of the company. As such he was a trustee. He and his co-directors invested the money of the company in the purchase of shares. The Court below has found the first and third issues in our favour, but has dismissed the suit, as it found the second issue for the defendant. Under the memorandum of association the directors were not justified in dealing in shares—*In re Asiatic Banking Corporation*, L. R., 4 Ch., 252; *Chadwyck Healey on Companies*, p. 21; *Ashbury Railway Carriage, &c., Co. v. Riche*, L. R., 7 H. L., 653. As to whether the suit was barred by limitation, the following authorities were cited:—Section 10 of the Limitation Act (XV of 1877); *Metropolitan Bank v. Heiron*, 5 Ex. D., 319; *Balwant Rao v. Purun Mal*, L. R., 10 Ind. Ap., 90; *In re Oxford Benefit Building and Investment Society*, 35 Ch. D., 502, at p. 509; *Flitcroft's case*, 21 Ch. D., 519; *Ramskill v. Edwards*, 31 Ch. D., 100; *Buckley on Companies* (6th Ed.), pp. 495 to 497; *In re Hallett's Estate*, 13 Ch. D., 696.

Where the Act of Limitation applies, the equitable doctrine with regard to staleness of claim does not apply. They referred [126] to *Buckley on Companies* (6th Ed.), p. 411; *Stringer's Case*, L. R., 4 Ch., 475; *Erlanger v. New Sombbrero Phosphate Co.*, 3 Ap. Ca., 1218, at 1278; *Rama Rau v. Raja Rau*, 2 Mrd. H. C. Rep., 114; *Peddammuthulaty v. N. Timma Reddy*, *Ibid.*, 270; *Tarack Chunder Bhuttacharjee v. Huro Sunkur Sandyal*, 22 Cal. W. R., 267, Civ. Rul.; *In re Sharpe, &c.*, L. R. (1892) 1 Ch., 154; *The New Fleming Spinning and Weaving Co. v. Kessowji Nark*, L. R., 9 Bom., 373; *Juggernath Sahoo v. Syud Shah Mahomed*, L. R., 2 Ind. Ap., 48; *In re Hallett's Estate*, 13 Ch. D., at p. 709; *Cunningham v. Foot*, 3 Ap. Ca., 974; *Lindsay Petroleum Co. v. Hurd*, L. R., 5 P. C., 221; *In re Mammoth Copperopolis of Utah*, 50 L. J. (Ch.), 11; *In re Alexandra Lance Co.*, 21 Ch. D., 149.

Inverarity (with *Macpherson*) for the Respondent (defendant):—We contend that the Limitation Act (XV of 1877) applies to this case, and that the suit was barred at the end of six years by article 120* of the schedule of that Act. In cases to which section 10 of that Act applies it is true that no lapse of time is a bar to an action. But that section does not apply here. It applies only when the suit is a suit against "persons in whom property has been vested in

* [Art. 120:—

Description of suit.	Period of limitation.	Time from which period begins to run.
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.]

trust for some specific purpose." But a director of a company is not such a person. He is not a trustee, and he is not a person in whom property is vested for a purpose. He is, no doubt, in a fiduciary position and may be guilty of a breach of duty or a breach of trust, but that does not necessarily make him a trustee. Persons in a fiduciary position are loosely and for convenience called trustees, but they are not necessarily trustees. Section 10 does not apply to all persons in a fiduciary position. It does not apply to all cases of breach of duty or breach of trust. It is expressly limited to breaches of trust by persons who are strictly and properly trustees. Compare Stat. 3 and 4 Will. IV, sec. 25, from which section 10 is taken. For a definition of breach of trust see Wharton's Law Lexicon, p. 102. No person is properly called a trustee except a person in whom property is vested. Directors of a company have merely an authority or power to manage the property of the company, but no estate is vested in them. As to the meaning of "vest," see [127] Lord WESTBURY's judgment in *Dickenson v. Teasdale*, 1 DeG. J. and S., 52, at p. 59; *Kherod-money v. Doorganoney*, I. L. R., 4 Cal., 455, *Coverdale v. Charlton*, 4 Q. B. D. per BUTT, J., at p. 120; *Greender v. Mackintosh*, I. L. R., 4 Cal., 897. Compare the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21), section 7; Act V of 1881, section 4; Bombay Municipal Act III of 1888, section 298; *Rolls v. The Vestry of St. George, the Martyr of Southwark*, 14 Ch. D., 785; *Queensbury Industrial Society v. Pickles*, L. R., 1 Ex., 1; Lindley on Companies (5th Ed.), p. 364--374. Directors are not trustees: see per BOWEN, L.J., in *Imperial Hydropolis Hotel Company v. Hamsen*, 23 Ch. D. at p. 12, *In re Faure Electric Accumulator Co.*, 40 Ch. D. 141, at p. 150; *Sheffield, &c., Building Co. v. Aizlewood*, 44 Ch. D. at p. 152; *Knowles v. Scott*, L. R. (1891), 1 Ch., at p. 722; *Smith v. Anderson*, 15 Ch. D., 275; *The London Trust Co. v. Mackenzie*, 62 L. J. Ch., 870.

Under the Indian Trusts Act a director is not a trustee: see section 3. That Act regards a trustee as owner of the property: see section 88. Counsel also cited *Balvantrav v. Purshotam*, 9 Bom. H. C. Rep., at p. 111; *Umias Shankar v. Chhotalal*, I. L. R., 1 Bom., 19; *Luchmes Buxsi Roy v. Runjeet Ram Panday*, 13 Beng. L. R., (P. C.), 177; *Greender v. Mackintosh*, I. L. R., 4 Cal., 897; *Kherod-money v. Doorganoney*, *Ibid*, 455, *Arunachala v. Ramasamy*, I. L. R., 6 Mad., 402; *Thackersay Deuraj v. Hurkhum Nursey*, I. L. R., 8 Bom., 432; *Zemindar of Falcoudah v. Secretary of State for India*, L. R., 12 Ind. Ap., 120; *Balwant Rao Bishwant v. Purn Mal*, L. R., 10 Ind. Ap., 90. Lindley on Company Law (5th Ed.), p. 526; *Trevor v. Whitworth*, 12 Ap. Ca., 409. We contend that the suit is barred by limitation.

Lang in reply, as to the meaning of the word "vest" referred to *Sethu v. Krishna*, I. L. R., 14 Mad., 61; *Sethu v. Subramanya*, I. L. R., 11 Mad., 279; *Metropolitan Bank v. Heiron*, 5 Ex. D., 325; Stroud's Judicial Dictionary (1890); The English Judicature Act, 1873, section 25.

[128] Sargent, C.J. :—The suit which has given rise to this appeal, was brought by the liquidator of the Kathiawar Trading Company against the defendant, who was one of the directors during the short existence of the company before going into liquidation, to recover the balance of moneys expended by the directors in the purchase of shares of various companies, and which have not been accounted for, on the ground that such share transactions were *ultra vires* the company and, therefore, the directors. The transactions as alleged in the plaint are not disputed by the defendant, who is the only surviving director with the exception of Jugjivan Hemji and Gopalrao Bulwant, who have become insolvents.

The first question, therefore, for consideration is whether the trading in shares by the directors was within the words of the memorandum of association, which determines the purposes for which the company was incorporated. (His Lordship read the clause in the memorandum above set forth and continued) :—

It has been contended for the defendant that it came within the general words "and carry on such local trade as may seem profitable." It would, we think, be difficult to say that the term "trading" necessarily excludes traffick- ing in shares; but such general words must, according to well-established principles of construction, be read in conjunction with what has gone before in the memorandum. The case of *Ashbury Railway Carriage, &c., Company v. Riche*, L. R., 7 H. L., at p. 664, is a good illustration of the application of that principle of construction. Now the primary object for which this company was established was to do commission agency, a general trading in cotton and other staple products, to be procured, as far as possible, from the producers in Kathiawar, Gujarat, Marwar and parts of the interior of the country, with the view of disposing of the same either in Bombay or shipping them to England; and, secondly, general trading in goods and commodities suited for the market in the interior of India. So far the object of the company (as stated by the memorandum of association) is to trade with the interior of India; but, if found desirable, the company might purchase cotton and produce in [129] Bombay and ship to England and "carry on such local trade as might seem profitable." In other words, the memorandum contemplates the possi- bility of its being found desirable to purchase cotton and produce in Bombay for the purpose of shipping to England and "carrying on such local trade as may seem profitable." By "such local trade" must be meant trade in Bombay of the same nature as before mentioned, *viz.*, "goods and commodities;" the choice being left as to the particular goods and commodities they should trade in. "Goods and commodities" cannot, we think, according to the ordinary use of those terms, be held to include "shares in companies," and we agree, therefore, with the Judge of Division Court that the transactions were *ultra vires*.

Assuming, then, that the moneys of the company were misapplied by the directors in the sense of being applied to a purpose, which was *ultra vires*, there can be now no doubt, upon the English authorities, that the directors are liable to replace the moneys. I need only refer to the judgment of Sir G. JESSEL in *In re National Fund Association* 10 Ch. Div. 128, where the payment of divi- dends out of capital was held to be *ultra vires*, and of Lord Justice LINDLEY in *In re Sharpe*, L. R. (1892) 1 Ch. at p. 165 when he says "as soon as the conclusion is arrived at that the company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted."

The more difficult question in the case remains for consideration, namely whether the right to recover the moneys by the liquidator is barred by the Act of Limitation or by the staleness of the demand on the principles laid down by the Privy Council in *Lindsay Petroleum Co. v. Hurd*, L. R., 5 P. C., 221, and Lord BLACKBURN, in *Erlanger v. New Sombrero Phosphate Co.*, 3 Ap. Ca., 1218. Apart from the operation of section 10 of the Act of Limitation on which the plaintiffs rely, such a claim would be barred, we apprehend, in six years under article 120 of the Act, which period has long expired, and it has been contended for the defendant that the language of the above section is not appli- cable to the present case. Now that directors are *quasi*-trustees in respect of the capital [130] of the company, and it is said that, in the event of their

applying the funds of the company in a manner which is *ultra vires* the memorandum of association, the relief which the Court will give against them is not barred by the Statute of Limitations is treated as settled law by KAY, J., in *In re Oxford Benefit Building and Investment Society*, 35 Ch. D. at p. 509, and was so regarded by the Court of Appeal in *In re Sharpe*, L. R. (1892) 1 Ch., at p. 165.

It is, however, to be remarked that directors of a company are precluded, in England, from pleading the bar of the statute by virtue, either of a general rule of the Court of Equity applicable to all trustees, or *quasi-trustees*, or else by the Judicature Act of 1873, which is applicable to all persons "holding" property upon trust, but that the question, whether they are precluded in this country, depends exclusively upon whether they can, in the language of section 10 of the Statute of Limitations, be regarded as "persons in whom the property of the company is vested in trust for a specific purpose." It is certainly not vested in them, as is the case with trustees of a settlement or will. Lord Justice JAMES remarks on this distinction in *Smith v. Anderson*, 15 Ch. D. at p. 275. He says: "The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional and casual circumstance."

Mr. Justice KAY in *In re Fawcett Electric Accumulator Co.*, 40 Ch. D. at p. 150, alluding to the same distinction says: "One obvious distinction, (*i.e.*, between directors and trustees of a settlement or will) is that the property of the company is not legally vested in them, but at the same time they have large powers of management and control vested in them over the property of the company." It is doubtless by reason of such management and control that they are held liable for the misappropriation of the trust funds, as explained by Sir G. JESSEL in *In re Forest of Dean Coal Mining Company*, 10 Ch. D. at p. 451, but it is certainly contrary to the ordinary accepted meaning of the term "vesting" to say that property is vested in persons by reason merely of their having control over it. "Vesting" as explained by BRETT and COTTON, JJ., in *Coverdale v. [131] Charlton*, 4 Q. B. D., 120, when applied to the subject-matter of property according to its ordinary legal acceptance gives the property in it and not merely the control over it. Again, in *Dickenson v. Trasdale*, 1 DeG. J. and S., 52, Lord WESTBURY construing "vesting" in 3 and 1 Will. 1, sec. 25, which is substantially the same as section 10 of the Limitation Act of 1877, c. 27, held that "vesting" implied property in the subject-matter that a person who had merely power to charge the land did not, therefore, come under the section. On the whole, although directors of a company are *quasi-trustees*, we think it would be unduly straining the language of section 10 to say that they are persons in whom the property of the company is vested as contemplated by that section. It may perhaps be subject of regret that such should be the conclusion on the language of the section. If so, it will be for the Legislature to amend the section.

This is sufficient for the decision, but we think it right to express an opinion that, in any view of section 10, the staleness of the present demand is a valid defence to the action. In *In re Mammoth Copperopolis of Utah*, 50 L. J. Ch., 11, HALL, V. C., held that the claim against the directors could not be enforced on the ground of great default on the part of the liquidators and the difficulty in which the directors would be consequently placed by such default. It is true that in *In re Sharpe* two of the Lords Justices, LINDLEY and FRY, L. JJ., reserved their opinions whether the doctrine of staleness of the demand is applicable to a demand against directors to restore the funds applied *ultra vires*, but as the liquidation is for the purpose of settling all claims arising out of the working of the company and all interests, whether of the creditors or the

shareholders, are fully represented for that purpose by the liquidators, it is difficult to understand why the doctrine when the liquidators are in fault should not equally apply to such a demand. In the present case the liquidators, as admitted by the present liquidator, had full knowledge that the capital of the company had been applied in trafficking in shares. That is shown by the directors' report and the schedule of debts [132] produced by the liquidators at the commencement of the liquidation. Nevertheless the liquidators never made any claim or took any steps to make the directors liable until the present suit was brought. During the long period of twenty-three years which has elapsed since the company went into liquidation the co-directors of the defendant have either died or become insolvent, and the defendant's right to contribution from them in the event of his being held liable is thus rendered practically valueless—a circumstance much relied on by Lord CAMPBELL, in *Bright v. Legerton*, 2 DeG. F. and J., 606, as showing the unreasonableness of a stale demand in that case and which the cases show is the foundation of the doctrine. In *Erlanger v. New Sombrero Phosphate Co.*, Lord BLACKBURN says: "It must always be a question of more or less dependence on the degree of diligence which might reasonably be required and the degree of the change which has occurred whether the balance of justice or injustice is in favour of granting the remedy, or withholding it." In the present case, after such a period of time and such changes, we cannot doubt the balance is in the favour of the latter, and that the Division Court was right in so holding.

For these reasons we must confirm the decree, except as to costs. The plaintiff to have his costs here and in the Division Court.

Decree confirmed.

Attorneys for the Plaintiffs: —Messrs. *Crawford, Barber and Co.*

Attorneys for the Defendant: —Messrs. *Bhaishankar and Kanga.*

NOTES

[See also (1891) 18 Bom. 101 at 121.]

[133] APPELLATE CIVIL

The 30th January, 1893.

PRESENT:

SIR CHARLES SARGENT, K.T., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Gopal Krishna Parachure.....(Original Plaintiff No. 2) Appellant
versus

Sakhojirav.....(Original Defendant) Respondent.*

Khoti Act (Bombay Act I of 1880), Secs. 17¹, 20¹, 21^s and 22^s --Entry in the Settlement Officer's record -- "Conclusive and final evidence of the liability" -- Reference to debate in Legislative Council-- Construction.

An entry in the Settlement Officer's record referred to in section 17 of the Khoti Act (Bombay Act I of 1880) is conclusive as to the nature and amount of rent. The words "conclusive and final evidence of the liability" in section 17 have the effect of shutting out any other evidence on the subject which might be adduced before the Civil Court.

The words "when not final" in section 21 of the Act refer to the finality ascribed in section 17 to the entries of the nature therein mentioned, and which follow as contemplated in section 20 on the survey officer arriving at his decision.

For the purpose of construing an Act, the debate upon the Bill when before the Legislative Council is not to be referred to.

SECOND APPEAL from the decision of J. Fitzmaurice, Acting District Judge of Ratnagiri.

[134] The plaintiff sued to recover from the defendant the balance of profits for the years 1886-1887 and 1887-1888 on account of the cultivation of certain lands in a village of Duncavah, of which the plaintiffs' agent was the managing khot. The suit was filed on the 20th July 1888.

Defendant contended (*inter alia*) that the plaintiff was not entitled to recover *thal* (rent in kind) for the lands which were liable only to a permanent *makta* (rent in cash); that on the 12th June 1887, it had been decided by the special Assistant Collector and Settlement Officer that the lands were liable to *makta*, that the suit not having been instituted within one year from the date of that decision was time-barred; that the *makta* for the year 1886-1887 was

* Second Appeal, No. 725 of 1891.

The following are the sections of the Act referred to:—

† 17. The other records prepared under the said section shall specify the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of section 33, and any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established.

‡ 20. If it shall appear to the survey officer, who frames the said register or any other record, that there exists any dispute as to any matter which he is bound to record, he may, either on the application of any of the disputant parties, or of his own motion, investigate and determine such dispute and frame the said register or other record accordingly.

§ 21. In any such matter the decision of the said survey officer, when not final, shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court.

¶ 22. No suit shall lie against the said survey officer, or against Government, or any officer of Government to set aside any such decision of a survey officer; but the record from time to time be amended by the said survey officer, or when the survey settlement is concluded by the Collector, in accordance with any such decree as aforesaid which the parties may obtain *inter se* on an application, accompanied by a certified copy of such decree, being duly made to the said survey officer, or to the Collector for that purpose.

already paid, and that he was ready and willing to pay the balance of *makta* for the year 1887-1888, but the plaintiff had declined to accept it.

The Subordinate Judge found that the custom of the payment of the *makta* alleged by the defendant was proved. that the suit was not barred by the order passed by the Settlement Officer, but that it was barred by article 14^{*}, Schedule II of the Limitation Act (XV of 1877) only with respect to the lands comprised in that order and not with respect to others. The Subordinate Judge, therefore allowed the claim to the extent of Rs. 28-3-10.

The plaintiff appealed to the District Court, and the defendant presented cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

The District Judge held that the entries of the nature of the amount and rent contained in the decision of the Settlement Officer were absolutely final. In his judgment he said :

"Now section 17 of the Khoti Settlement Act, 1880, says that 'any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established.' Sections 20 and 21 must relate to disputes as to other matters than 'the nature and amount of rent payable to the khot by each privileged occupant,' for section 21 says 'in any such matter the decision of the said survey officer, when not final, shall be binding * * * until reversed or modified by a final decree of a competent Court.'

[135] "A distinction is plainly made between the effects of entries in regard to the particular matters referred to in section 17 and the effect of those made under section 20, the latter being liable to be upset by the Civil Courts, while the former are 'conclusive and final evidence of the liability thereby established'

"That the entries under section 17 are intended by the Legislature to be final,—that is, not liable to be upset by the Civil Court,—is, I think, shown by the debate in Council on the Bill which took place on the 6th January 1880." (The Judge then quoted passages from the debate and continued :—) "I am, therefore, of opinion that the entries shown in Exhibit 18 referring to some of the lands in dispute are final evidence that those lands are liable to *makta* at the rates laid down."

The Judge having come to the above conclusion, the parties consented to a decree being passed for the plaintiff for the amount awarded by the Subordinate Judge with costs ; the right of appealing against the decision of the Judge being reserved.

The plaintiff preferred a second appeal to the High Court.

Ganesh Krishna Deshamukh, for the Appellant (Plaintiff) :—The lower Court has misconstrued section 17 of the Khoti Act. That section must be read along with section 22. An entry made by a settlement officer under the provisions of section 17 is conclusive of the liability mentioned in the entry itself and no further. The entry is final and conclusive so long as it exists, but not for ever. Section 22 contemplates the modification of the entry made under section 17. Section 17 should be construed in a manner consistent with the tenor of the whole Act. A Civil Court cannot go behind the entry so long as it stands, but a Civil Court may entertain a suit for the cancellation of the

* [Art. 14.—

Description of suit.	Period of limitation.	Time from which period begins to run.
To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.	One year	The date of the act or order.]

entry. If the Legislature had intended that the entry should be final, then the section would have ended with the word "final," and there would have been no addition of the other words. The present suit is brought for the purpose of getting the entry cancelled. In interpreting sections 17 and 21 of the Khoti Act the Judge was wrong in referring to the debate in the Legislative Council. Act X of 1876, section 12, was cited.

[136] *Ganpat Sadashiv Rao*, for the Respondent, was not called upon.

Sargent, C. J. :—The District Court was wrong in referring to the debate on the bill for the purpose of construing section 17 of the Act, but we agree with him in his conclusion that the entry in the Settlement Officer's record was conclusive as to the nature and amount of the rent. The words "conclusive and final evidence of the liability" must, in the ordinary and grammatical meaning, have the effect of shutting out any other evidence on the subject which might be adduced before the Civil Court.

It was argued indeed that section 21 provides for the entries being only binding on the parties until the decision of the survey officer has been reversed by a competent Court, and that the words "when not final" in section 21 refer only to such matter as by the Revenue Jurisdiction Act of 1876 has been withdrawn from the jurisdiction of the Civil Courts. If that had been the intention we should expect it to be expressed in very different terms. The object of sections 20, 21, 22 is to point out the course the survey officer is to pursue when there are disputes between the parties, in order to enable him to make the entries required by section 17. And the words "when not final" can only, therefore, properly refer to the finality ascribed in section 17 to the entries of the nature therein mentioned and which follow as contemplated by section 20 on the survey officer arriving at his decision.

We must, therefore, confirm the decree with costs.

Decree confirmed.

NOTES .

[As regards the conclusive character of the evidence, see also (1895) 20 Bom., 475 ; 729; (1895) 21 Bom., 235 ; (1896) 21 Bom., 467 ; (1896) 21 Bom., 480.]

[18 Bom. 136]

APPELLATE CIVIL.

The 30th January, 1893.

PRESENT :

MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

Devshankar Naranbhai and others..... (Original Plaintiffs) Appellants
versus
 Motiram Jageshvar..... (Original Defendant) Respondent.*

* *Hindu law—Will—Bequest to dharmada—Dharmada—Dharma.*

A bequest in favour of *dharmada* is void by reason of uncertainty. The law on this point is the same in the Mofussil as in the Presidency town.

[137] SECOND APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad, reversing the decree of Rao Sahib Maneklal Narotamdas in Suit No. 589 of 1889.

The plaintiffs sued, as executors of the will of one Jethalal Jageshvar, to recover possession of certain moveable property belonging to the testator, or for

* Second Appeal, No. 864 of 1891.

its value, and for an injunction restraining the defendant from obstructing them in taking possession of the property in dispute.

The material portions of the will in question were as follow :—

"After my death my executors shall cause my obsequies to be performed by my brother Motilal and his son Anrmtal conformably to the custom of my caste and with reference to the amount of my property. The executors shall pay out of my property Rs. 100 to my brother Motilal and his sons. Should they not perform my funeral ceremonies the same should be performed by my sister's son. And the amount ordered to be paid to my brother should be paid to him. The ceremonies should be performed up to my anniversary. Should any property remain after what is expended as above, the whole of it should be expended for *dharmada* after my death by the trustees as they think proper."

The defendant contended (*inter alia*) that the will was invalid, and that the residuary bequest to *dharmada* was void for uncertainty.

The Subordinate Judge held that the will was valid; that the residuary bequest was not void on the ground of uncertainty, and that the plaintiffs as executors, were entitled to recover the property in dispute. He, therefore, awarded the plaintiffs' claim.

This decision was reversed, on appeal, by the District Judge, who held, on the authority of *Lakshmishankar v. Varjunath*, I. L. R. 6 Bom., 24, that the bequest to *dharmada* was void, and that though the will was valid so far as it related to the performance of the funeral ceremonies and the payment of Rs. 100 to the testator's brother, the plaintiffs were not entitled to recover, as the funeral obsequies had been already performed by the deceased's brother, who was willing to allow his claim for those expenses to be merged in his general title.

[138] Against this decision the plaintiffs preferred a second appeal to the High Court.

Goverdhan M. Tripathi, for Appellants.—The question in this case is whether a gift in *dharmada* is void for uncertainty. The word *dharmada* is not synonymous with *dharma*. The latter is a term of very wide import, as denoting religion, charity, benevolence, virtue, justice, &c., whilst the term *dharmada* is restricted in its meaning to charitable gifts alone. Bequests to charity are valid under the English law—*In re Douglas*, 35 Ch. D., 472; *Wilkinson v. Lindgren*, L. R. 5 Ch., 570; *In re Sutton*, 28 Ch. D., 164; *Lewis v. Allenby*, L. R., 10 Eq. Ca., 668. But assuming that *dharmada* and *dharma* are convertible terms, still the law on this subject, as laid down by this High Court in the Presidency town, has no application to the Mofussil. The rulings in *Ganghai v. Thavar Mulla*, 1 Bom. H. C. Rep., 71, and *Cursandas Gorindji v. Vundravandas*, I. L. R., 14 Bom., 482, do not govern the present case. These cases are decided by analogy to Statute 43 Eliz., c. 4. But it would be wrong to extend the analogy of this statute to cases arising in the Mofussil—*The Advocate-General v. Vishvanath*, 1 Bom. H. C. Rep., 9, App., *Parmanandas Jivandas v. Venayek Rao*, I. L. R., 7 Bom., 19.

Manekshah Jehangirshah, for Respondent :—There is no difference in meaning between *dharma* and *dharmada*. *Dharmada* is property set apart for *dharma*. It would be wrong to restrict the meaning of *dharmada* to charitable gifts alone. The reason why a bequest to charity is valid under the English law is because the Courts of Equity in England have always attached a definite meaning to the term "charity." Has the word *dharma* such a definite meaning here? It means any kind of charitable, religious, or benevolent objects. It is too vague and uncertain. It is on this account that a bequest in *dharma* is

held void. The Court cannot give any effect to such bequest. And the law on this point is now too well settled to be called in question.

Fulton, J. :—We have carefully considered the arguments of Mr. Govardhanram, but are unable to hold that there is any real distinction between a bequest to be expended on *dharmada* and [139] a bequest for *dharm*. If it be the case that the latter is void as being too vague a specification of the objects on which the testator desired his money to be expended, it appears to us to follow that a bequest for *dharmada* must equally fail by reason of uncertainty.

Mr. Maneklal Narotandas, in an able judgment, questioned the correctness of the decisions in which it has been held that bequests for *dharm* are ineffectual; but we think that the point has been settled in this Presidency for so long a time that it is now impossible to reconsider it. The earliest ruling on the subject to which our attention has been called is that of Sir FRSKINE PERRY and Sir W. YARDLEY in the *Advocate-General v. Damodar*, 10 Ind. Oriental Cases, 526, which was followed in *Pranjiwandas v. Deekharan*, 4 Bom. H. C. Rep., 76, note, by Sir M. SAUSSE, C. J., and recently by Mr. Justice PARSONS in *Curshandas v. Vambharandas*, 1 I. R., 11 Bom., 482. It was urged that these decisions were passed either by the Supreme Court or by the High Court on its Original Side, and were, therefore, not determinative of the law in the Mofussil; but it appears to us that in a matter of this kind there can be no difference between the law in force in the Presidency town and that of the other parts of the Presidency. The Charter of the Supreme Court required it to be guided by the laws and usages of the Hindus, just as the Mofussil Courts are bound by Regulation II of 1827 to give effect to them. It can hardly be contended that there was any established law or usage regulating the phraseology of Hindu wills in the island of Bombay at variance with the law and usage on the same subject in the district of Ahmedabad; and, therefore, it follows that, if the Supreme Court correctly applied that law and usage in the case of *Advocate-General v. Damodar*, that application must be followed in the Mofussil just as much as in the town of Bombay. This principle appears to have been recognised by MELVILL, J., in *Lakshmishankar v. Vajrath*, 1 I. R., 6 Bom., 24, in which he does not seem to have doubted that a devise to *dharm* without any qualifying expression was too vague an indication of the testator's intention to constitute a valid gift to charity, or to have questioned the propriety of relying [140] on the decisions above referred to as precedents in a Mofussil case.

Whatever, then, might have been our opinion, if the matter had come before us unaffected by previous decisions, we do not feel justified now in reopening the subject. It is clear that, when the object of a bequest is so vaguely described that it cannot be ascertained, the gift must fail, but the exact point at which the line should be drawn between reasonable certainty and vagueness must necessarily give rise to a good deal of difference of opinion. If, then, there is to be any consistency in the decisions of Courts, and each case is not to be left to the individual opinion of the Judge who happens to try it, it is manifest that, when the vagueness of a word or expression has been pronounced in a course of decisions by Judges of high authority to be such as to render void the bequest to which it has been applied, it becomes the duty of other Judges to accept their views, unless it can be said with reasonable certainty that they are erroneous. In the present case, however, this cannot be said, for though there may be some difficulty in distinguishing between many of the objects included in the word "*dharm*" and those comprised in the term "charity," and it may be unsafe to hold that the latter covers a narrower range than the former, we think that the ground on which the decision in the *Advocate-General v. Damodar* was based, namely, that the reasons which led the Court of Chancery to uphold

the validity of gifts to charity, were inapplicable to gifts to *dharma*, can hardly be disputed. Other reasons might possibly be assigned for holding that the expression "*dharma*" or "*dharmada*" is not vague or indefinite; but apart from English precedents, we think that this question is of so uncertain a character that we ought to be guided by the decisions of the Judges who have already considered it. In a purely discretionary matter of this kind the earlier decisions must prevail in settling the law.

We, therefore, hold that the bequest in favour of *Dharmada* was void by reason of uncertainty, and confirm the decree. All costs throughout to be paid out of the testator's estate.

Decree confirmed.

NOTES.

[Bequest to *dharma* is invalid as being too vague. —(1897) 22 Bom., 771, (1899) 23 Bom., 725 P. C. ; (1901) 31 Cal., 895.]

[141] APPELLATE CIVIL.

The 2nd February, 1893.

PRESENT :

SIR CHARLES SARGENT, KT, CHIEF JUSTICE, AND MR JUSTICE BAYLEY.

Dayabhai Lallubhai and another.....(Original Defendants

Nos. 1 and 4) Appellants

versus

Gopalji Dayabhai..... (Original Plaintiff, Respondent.)

Landlord and tenant - Joint family - Manager - Lease granted by manager—

Right to sue for rent under such lease - Co-sharers - Parties - Practice.

A manager of a joint Hindu family who, as such has granted a lease, is during his lifetime the ~~only~~ person to sue for rent due under the lease, but after his death his son, who has ~~succeeded~~ succeeded his father in the management, cannot sue without joining the other members of the joint family as parties.

Dada v. Bunt, P. J. 1876, p. 11, and *Sayed Fatima v. Bala*, P. J., 1884, p. 33, followed.

SECOND APPEAL from the decision of J. B. Alcock, District Judge of Surat.

Suit for rent. The plaintiff sued the defendants for Rs. 139-8, the balance of rent for the year 1945 due on a rent-note alleged to have been passed by the defendants to the plaintiff's father Dayabhai Morarji.

Defendants Nos. 1 and 4 pleaded (*inter alia*) that they had passed the rent-note to the plaintiff's father Dayabhai as the manager of the united family to which the plaintiff belonged, and that the plaintiff could not sue alone, as the other members of the family had a share in the sum sued for.

Defendants Nos. 2 and 3. Biula Suru and Bhimbhai Bhulabhai, admitted the claim.

The Subordinate Judge held that the plaintiff could not sue alone, as the land in question was admittedly joint family property, and that the plaintiff was not shown to be manager of the family. He held that the other co-sharers were necessary parties, and he, therefore, dismissed the suit as against defendants Nos. 1 and 4.

* Second Appeal, No. 884 of 1891.

On appeal by the plaintiff, the District Judge held that, as the defendants had paid rent to the plaintiff, they were estopped from disputing his title to receive rent from them, and that the other members of the family were not necessary parties. He reversed the lower Court's decree and awarded the plaintiff's claim.

[142] Defendants Nos. 1 and 4 preferred a second appeal.

Manekshah J. Taleyarkhan for the Appellants (defendants).—The plaintiff succeeded his father as one of the heirs, but not as manager of the family. Therefore, the suit brought by him alone without joining the other co-sharers, who are equally interested in the estate, cannot lie.

Mahadeo Chimnaji Apte for the Respondent (plaintiff). He cited *Dada v. Bhan*, P. J., 1876, p. 11; *Sayad Patulla v. Bola*, P. J., 1884, p. 33; *Jethu Jadhavji v. Ganpatrao*, P. J., 1884, p. 286.

Sargent, C. J.—The decisions in *Dada v. Bhan*, P. J., 1876, p. 11, and *Sayad Patulla v. Bola*, P. J., 1884, p. 33, show doubtless that the plaintiff's father, who was manager and as such granted the lease, was the only person to sue for the rent whilst he was alive. But when he died, the plaintiff did not succeed to the management, and had, therefore, no exclusive right to sue for the rent.

We must, therefore, reverse the decree with costs here and in the Lower Appellate Court, and restore that of the Subordinate Judge.

Decree reversed.

NOTES.

[See also (1893) 22 Mad., 326.]

[18 Bom. 142]

APPELLATE CIVIL.

The 6th February, 1893.

PRESENT.

SIR CHARLES SARGENT, KT, CHIEF JUSTICE AND MR JUSTICE BAYLEY.

Manaku kom Pedru.....Petitioner

versus

Sitaram Atmaram Vagh.....Opponent.

*Practice- Procedure-- Ex-parte decree- Co-defendants--Small Cause suit -
Ex-parte decree against one of several defendants- Application by
co-defendant to set aside decree- Case re opened with respect to
the applicant only-- Civil Procedure Code (Act XIV
of 1852), Secs. 106, 108.*

Where a decree is set aside on the application of a defendant against whom it was passed *ex parte*, the case is not re-opened as against a co-defendant who had appeared and defended the suit.

REFERENCE made by Rao Bahadur Raghavenndra Ramechandra Gangolli, First Class Subordinate Judge of Karwar, under section 617 of the Civil Procedure Code (Act XIV of 1882).

[143] The opponent Sitaram Atmaram Vagh brought a suit against Francis Pedru and his mother Manaku in the Court of the First Class Subordinate Judge of Karwar, in its Small Cause Jurisdiction, to recover Rs. 476 9-0

*Civil Reference, No. 1 of 1893.

due upon a promissory note jointly passed by them. At the hearing only the first defendant appeared and resisted the claim. The second defendant, Manaku, was absent. The Subordinate Judge passed a decree against both the defendants. Subsequently Manaku (defendant No. 2) applied to set aside the decree, and the question arose as to whether, if the application were granted, the case would be re-opened with respect to defendant No. 1. The Subordinate Judge referred the question as follows :—

“Whether an application by a co-defendant praying for setting aside an *ex parte* decree in a Small Cause suit, if granted, re-opens the case against the defendant or defendants who were present and who conducted the defence in the original trials in cases where there is a common cause of action against all the defendants.”

The opinion of the Subordinate Judge was in the negative. He referred to the following cases.—*Lrojanath Surmah v. Anund Moyee Debia*, 7 Cal. W. R., 237, Civ. Rul.; *Huro Krishno Diss v. Motee Chand Baboo*, 8 Cal. W. R., 260, Civ. Rul.; *Dookhee Khan v. Rajessure Rance*, 15 Cal. W. R., 371, Civ. Rul.; *Nistarinee Dassie v. Debnath Bose*, 20 Cal. W. R., 286, Civ. Rul.

Purushotam Parashuram Khare (amicus curie) for the Petitioner.

Vasudeo Gopal Bhandarkar (amicus curie) for the Opponent

Sargent, C. J. :—Having regard to the language of sections 106 and 108 of the Civil Procedure Code (Act XIV of 1882) the question must be answered in the negative.

Order accordingly.

NOTES.

[In the C. P. C., 1908, O. 5, r. 13, this proviso was added :—“Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.” See also (1907) 6 C. L. J., 226; (1908) 31 M. L. J., 154; (1902) 21 All. J., 383 P. B.; (1902) 15 C. P. L. R., 179.]

[144] APPELLATE CIVIL.

The 9th February, 1893.

PRESENT:

MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

Krishnaji..... (Original Plaintiff) Appellant

versus

Wannaji..... (Original Defendant) Respondent.*

Fraud—Plaint—Form of plaint—Charges of fraud—Amendment of plaint—Practice—Procedure.

Where a plaintiff seeks relief on the ground of fraud, and the plaint contains general allegations but no specific instances, of the alleged fraud, it ought to be immediately, on presentation, rejected or returned for amendment, as it does not disclose a cause of action.

The plaintiff sued to recover damages caused by the defendant's fraud during his management of the plaintiff's estate from 1870 to 1881. The plaint disclosed no specific instances of the fraud imputed to the defendant. The Court of First Instance, without going into evidence, rejected the plaintiff's claim on the preliminary ground that the plaintiff had no right to sue during the lifetime of his adoptive mother. In second appeal, the respondent objected that the plaint was defective. The plaintiff's pleader asked for leave to amend it by specifying certain instances of the alleged fraud.

Held, that the amendment could not then be allowed, and the suit must fail. When fraud is charged, the evidence must be confined to the allegations.

* Second Appeal, No. 656 of 1891.

SECOND APPEAL from the decision of J. Fitzmaurice, Acting District Judge of Ratnagiri, in Appeal No. 270 of 1889.

The plaintiff sued to recover Rs. 3,000 as damages sustained by him by reason of defendant's fraud and misconduct whilst acting as agent under plaintiff's adoptive mother in the management of his estate.

The plaint was as follows :—

"One Ramchandra Bapuji Thakur adopted me (the plaintiff) and died in March 1870, whilst the plaintiff was a minor.

"Ramabai, the plaintiff's mother, carried on the management of the whole estate through the defendant. Therein he committed a good many frauds, and misappropriated considerable property, and removed the documents. And with a view to escape the consequences of his fraud he gave up the management in July 1884, and fraudulently obtained a release from Ramabai by misrepresenting and misstating matters therein.

[145] "Subsequently in August 1884, Ramabai delivered over to me, the plaintiff, all the management, the letters and documents, &c., received by her. Thereafter on my examining the said letters, documents and accounts relating to the management of the defendant, I found that he had not faithfully carried on the management of my property as my agent from March 1870 to August 1884, but had greatly benefited himself by fraudulently misappropriating the said property and writing false accounts.

"The plaintiff seeks to recover the damages caused by the defendant's fraud and breach of trust."

Defendant denied the alleged fraud and contended that the plaintiff had no right to sue during the lifetime of his adoptive mother, inasmuch as his adoptive father had left a will under which an absolute right of management was conferred on her during her lifetime.

Both the lower Courts rejected the plaintiff's claim on the preliminary ground that, under the will of plaintiff's adoptive father, Ramabai (the adoptive mother) was absolute owner and manager of the estate during her lifetime; that defendant was accountable to Ramabai alone; and that as she did not come forward to complain of his mismanagement, plaintiff had not the right to do so.

Against this decision the plaintiff preferred a second appeal to the High Court.

Mahadeo Chimnaji Apte, for the Respondent, took the objection that the plaint disclosed no cause of action and ought not to have been accepted. It did not mention any specific instances of fraud. It contained merely general allegations of fraud—*Gunga Narain Gupta v. Tuluckram Chowdhry*, I. L. R., 15 Cal., 533.

Manekshah Jhangirshah :—I admit that the plaint is defective. But I ask to be allowed to amend the plaint by specifying certain instances of fraud, which are proved in the case. A plaint can be amended even at this stage—*Joseph v. Colano*, 9 B. L. R., 441, and *Mohummud Zahoor Ali Khan v. Mussamat Thakooranee Kutta Koor*, 11 M. I. A., 468.

[146] *Fulton, J.* :—We think that the objection, taken by Mr. Apte, that the plaint discloses no specific instances of fraud, must be allowed. The decision of the Privy Council in *Ganga Narain Gupta v. Tuluckram Chowdhry*, I. L. R., 15 Cal., 533, shows that "with regard to fraud, if there be any principle, which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." Such being the case the plaint ought, immediately on presentation, to have been rejected or returned for amendment, as it did not disclose a cause of action. Mr. Manekshah

admits the defective nature of the plaint, but asks to be allowed to amend it by specifying certain instances alluded to in the Commissioner's reports, and offers to pay the costs of both appeals. Had the evidence, on both sides, regarding these alleged frauds, been taken, this course might, perhaps, have been adopted; but the Subordinate Judge dismissed the suit on another point without taking the evidence for the defendant, or finishing the evidence for the plaintiff. The frauds are alleged to have taken place before 1884, and the effect of the amendment would be that now, in the year 1893, the defendant would be required to give evidence to defend himself from charges of fraud which have never yet been clearly specified, and which were not embodied (and could not on the pleadings be embodied) in the issues in the Court of First Instance. Under these circumstances, we think the amendment should not now be allowed.

We were referred to the decisions in *Joseph v. Solano*, 9 Beng L. R., at p. 453, and *Mohammed Zahoor Ali Khan v. Mussumat Thakooranee Lutta Koer*, 11 Moo L. A., 468, as showing at how late a stage amendment may be allowed; but in the latter case (which was followed in the former), it appears that there was a total misconception of the nature of the suit. In the present case this does not seem to have occurred. Either the plaintiff when he presented his plaint, knew the instances of fraud alleged to have been committed by the defendant, in which case his omission to specify them suggests the belief that he pre-[147]ferred not to do so, with a view to keeping it open for himself to shape his allegations as he went along to meet the evidence, or he did not know of them and began a suit without any ground to go upon and simply in the hope that he would be able to make out a ground by evidence later on. In either alternative, it does not seem desirable now, nine years after the alleged frauds, to allow the amendment of the plaint. Without such amendment, however it is clear that the suit must fail, as it is well settled that when fraud is charged, the evidence must be confined to the allegations.

On those grounds, then, we confirm the decree of the Courts below with costs.

Decree confirmed.

NOTES.

[General allegations of fraud are insufficient. — (1894) 19 Bom., 593; (1909) 5 I. C., 179.]

[18 Bom. 147]

APPELLATE CIVIL.

The 10th February, 1893.

PRESENT:

MR. JUSTICE TELANG AND MR. JUSTICE FULTON.

Jankibai, (Original Plaintiff) Appellant
versus

Mahadev and others, (Original Defendants) Respondents.

*Hindu law — Joint family — Family debt — Liability of family property —
Manager — Decree against manager — Execution sale — Questions for Court
to decide in determining the quantum of interest which passes to the
auction purchaser.*

Where the manager of a joint Hindu family is sued for the recovery of a debt, and his right, title and interest in the family property are sold in execution, the questions which the

* Second Appeal, No. 266 of 1891.

Court has to decide in determining the *quantum* of interest which has passed to the auction-purchaser are : (1) whether the debt was one for which the entirety might, by proper procedure, have been brought to sale, and (2) whether, as a matter of fact, the purchaser bargained and paid for the entirety.

A and his three younger brothers B, C and D were members of a joint Hindu family. A was the manager of the family. After A's death, B, C and D were sued as his legal representatives in respect of a debt which A had contracted for the benefit of the family. A decree was passed against them as A's representatives, directing the recovery of the debt by sale of A's estate. In execution of this decree, A's right, title and interest in certain family property was put up to sale.

Held, that the sale affected the rights of all the members of the joint family. Under the circumstance what was meant to be brought to sale was the right, title and interest of the family of which Sakharām had been the manager, and for the benefit of which the debt had been incurred.

[148] SECOND APPEAL from the decision of Rao Bahadur N. G. Phadake, First Class Subordinate Judge, A. P., of Satara in Appeal No. 282 of 1889.

Suit for redemption of certain land. The land in question was family property and belonged to four brothers, viz., Sakharām, Sitaram, Govind and Antaji.

Sakharām was the manager of the family. In 1871 he mortgaged the property to Vinayak, the father of defendant No. 1.

In 1872 and 1873 he passed two other bonds in favour of Vinayak to secure certain debts contracted for the benefit of the family.

After Sakharām's death, his brothers were sued as his legal representatives on the two bonds of 1872 and 1873, and a money decree was passed against them, directing that the decretal amount should be recovered out of the property of the deceased Sakharām.

In execution of this decree, Sakharām's right, title and interest in the property in dispute were put up to sale on the 13th October 1875, and purchased by defendants Nos. 2, 3 and 4.

By a deed of sale dated 15th February 1881, Sitaram, Govind and Lakshumibai, widow of Antaji, conveyed their interests in the lands in suit to plaintiff No. 1.

In 1887 the present suit for redemption was filed by plaintiff No. 1. Plaintiffs Nos. 2 and 3 were joined subsequently to the institution of the suit, as persons interested in the equity of redemption.

The main question at issue between the parties was, whether the interest of Sakharām alone, or the interests of his brothers also, passed to the defendants Nos. 2, 3 and 4 at the Court-sale held in 1875 in execution of the money decree obtained by Vinayak, the father of defendant No. 1.

On this point both the lower Courts found that Sakharām was manager of the family; that the debt for which the decree was passed, and the property sold in execution, was contracted **[149]** by Sakharām for the benefit of the family, and that, therefore, the interests of all the brothers passed to the defendants Nos. 2, 3 and 4 as auction-purchasers.

The lower Courts, therefore, held that the plaintiffs were not entitled to redeem that portion of the property which was purchased by defendants Nos. 2, 3 and 4.

Against this decision plaintiff preferred a second appeal to the High Court.

Mahadeo Chimnaji Apte, for Appellant:—The decree in execution of which the property in dispute was sold, was a decree against Sakharām's property in the hands of his heirs. It was a money decree for the recovery of a debt contracted by Sakharām alone. The decree and the sale in execution affected only Sakharām's interest in the family property. Even in the case of a father, a sale in execution of a money-decree against him passes his interest only, in the absence of any special circumstances showing an intention to put up to sale the entire interest of the family—*Maruti Sakharām v. Babaji*, I. L. R., 15 Bom., 87; *Pandu v. Maniklal*, P. J. for 1891, p. 124; *Basaya v. Fakirgavda*, P. J. for 1892, p. 141.

M. B. Chaulbal, for Respondent No. 1.

Shivram Vitthal Bhandarkar, for Respondents Nos. 2 to 4:—What was sold is a question of fact, and both the lower Courts have found, as a fact, that the interest of the whole family was put up to sale and purchased by the respondents. This finding is conclusive in second appeal—*Appaji Bapuji v. Keshav*, I. L. R., 15 Bom., 13. At the time of the suit, Sakharām's brothers were not minors. They were parties to the suit, and they raised no objection in the execution proceedings to the sale of the entire family estate. They are, therefore, estopped, and so is the plaintiff, their assignee, from contending that Sakharām's interest alone passed to the auction-purchasers. Cites *Nimba v. Sitaram*, I. L. R., 9 Bom., 458; *Punchanun v. Rabia Bibi*, I. L. R., 17 Cal., 711; *Hari Vitthal v. Jiram*, I. L. R., 14 Bom., 597; *Jagabhai v. Vighnakan-* [150] *das*, I. L. R., 11 Bom., 37; *Jairam v. Joma*, *ibid.*, 361; *Kagal Ganpaya v. Manjappa*, I. L. R., 12 Bom., 691; *Vishnu v. Venkatrav*, P. J. for 1889, p. 248; *Varudev v. Krishna*, P. J. for 1891, p. 18.

Mahadeo Chimnaji Apte, in reply:—The decree is plain on the face of it. It binds only Sakharām's interest in the family property—*Kisansing Jivansing v. Moreshwar*, I. L. R., 7 Bom., 91.

Fulton, J.:—The only point argued in this appeal was whether the District Court was correct in holding that the rights of Sitaram, Antaji and Govind in certain portions of the property in dispute were conveyed to defendants Nos. 2 to 4 by the auction sales referred to in certificates 84, 86 and 88.

Sakharām was, it has been found, the manager of the family, and the debt, to recover which the auction sale took place, was, according to the finding of the Court of First Instance, contracted for family purposes. Against this finding no express appeal was made to the District Court, and no issue was sought for on the subject. Under these circumstances, we think the District Court could rightly regard the debt as a family debt, and that we are bound to treat it as such. When the suit was brought to recover this debt, Sakharām was dead, and it was accordingly filed against his brothers Sitaram, Govind, and Antaji as his representatives. A decree was passed against them in this capacity directing the recovery of the debt by the sale of Sakharām's estate. In execution of this decree the deceased Sakharām's right, title and interest were sold, and the question now arises whether the sale affected the rights of all the members of the joint family in the property or not.

As the debt was a family debt it is obvious that all those rights could be sold to satisfy it, and the question, therefore, is narrowed to one of procedure. Strictly speaking, at the time of the sale, Sakharām's estate had ceased to exist; for, at his death, his interest, in the joint property, passed to his brothers,

but under the circumstances we think the lower Court was right in holding that what was meant to be brought to sale and conveyed was the right, title and interest of the family of which [151] Sakharam had been the manager, and for the benefit of which the debt had been incurred. An examination of the various reported decisions in suits in which a manager, whether a father or a brother, has been sued for the recovery of the debt and in which his right, title and interest have been sold in execution, leads to the conclusion that the questions, which the Court has to decide, are whether the debt was one for which the entirety might by proper procedure have been brought to sale, and whether, as a matter of fact, the purchaser bargained and paid for the entirety — *Hari Vithal v. Jairam Vithal*, 1. L. R., 14 Bom., 597, and this conclusion seems, in no way, inconsistent with the decision in *Pandu v. Maniklal*, P. J. for 1891, p. 124, which merely shows that the sale of a manager's interest will not, in the absence of the above special circumstances, affect the rest of the family.

In the present case the suit was brought in a very awkward form against the three brothers as representatives of their deceased brother, but we think that the principle which governed the decision in *Hari Vithal v. Jairam Vithal*, 1. L. R., 14 Bom., 597, and other cases relating to the same subject, left it open to the District Court to decide whether the purchasers, as a matter of fact, bargained and paid for the whole family interest. On this issue the First Class Subordinate Judge's judgment (though not quite so clear as might have been desired) amounts to a finding in the affirmative. This finding is in accordance with probability, as the Court cannot have intended to sell, or the purchasers to buy, merely an interest which was non-existent at the time of the sale, and it is clear that it is in accordance with the facts of the case. *Hari Vithal v. Jairam Vithal*, 1. L. R., 14 Bom., 597, and *Antaji and Govind v. Sakharam*, 21 Bom., 204; 516; (1900) 3 Bom. L. R., 322.]

We must, therefore, confirm the decree of the First Class Subordinate Judge, A. P. The appellant to pay separate costs for the respondents, represented by Mr. Chaubal and Mr. Bhandarkar respectively.

Decree confirmed.

NOTES.

[The words 'right, title and interest' are ambiguous denoting either the individual interest of the judgment debtor or the joint interest which can be validly disposed of by him;— 896) 21 Bom., 204; 516; (1900) 3 Bom. L. R., 322.]

[152] APPELLATE CIVIL.

The 20th February, 1893.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Bhimbhai and others.....Appellants

versus

Ishwardas Jugjiwandas and another.....Respondents.*

Company—Indian Companies' Act (VI of 1882), Sec. 13—Contributory—Increase of capital—Illegal issue of shares—Reduction of capital.

The Nawab of Beyla Spinning, Weaving and Manufacturing Company, Limited, was registered under the Indian Companies' Act (X of 1866). The original capital of the company consisted of Rs. 4,00,000, divided into 1,600 shares of Rs. 250 each. In 1882 the capital of the company was increased by Rs. 1,00,000 divided into 1,600 shares of Rs. 62-8. The resolution to increase the capital was not passed in accordance with the articles of association, i.e., "with the sanction of a special resolution of the company passed at a general meeting." On the 5th November 1884, a resolution was passed at a general meeting of the company that the shareholders should take up the 459 shares of the original capital and 1,027 shares of the increased capital, which were then in the hands of the company, in the proportion of one share to every two shares already held by them. In pursuance of this resolution the appellants took up several shares of the original capital as well as of the new capital. On 19th October 1885, a general meeting of the company was held at which it was resolved that the resolution of the 5th November 1884, and all acts done in connection with it should be set aside, that the shares taken by the shareholders in pursuance of that resolution should be taken back by the company, and such amounts as had been paid by them on those shares should be credited to their names in the company's books. This was accordingly done, and the shares were transferred to the name of the company. In October 1886, the company was wound up by order of the Court. In settling the list of contributories, the District Judge of Surat held that the appellants were liable, as contributories, in respect of all the shares which they had taken up in pursuance of the resolution of 5th November 1884. On appeal from this decision,

Held, that with respect to the shares of the original capital, the resolution of the 19th October 1885, was illegal and invalid. It operated, not as an investment by the company of its funds in its own shares, but as an extinguishment of the shares, and such extinguishment was virtually a reduction of the capital, which could not be done without complying with the provisions of section 13† of the Indian Companies' Act (VI of 1882). The holders of such shares were, therefore, properly placed on the list of contributories.

* Appeals Nos. 121, 146, 147, and 166 of 1892.

† [Sec. 13:—Any Company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any Company shall come into operation until an order of the Court is registered by the Registrar of Joint Stock Companies, as is hereinafter mentioned.]

Explanation I.—The word 'capital' includes paid-up capital.

Explanation II.—The power to reduce capital conferred by this section includes a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the Company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company; and, to the extent to which such liability is not extinguished or reduced, it shall be deemed to be preserved, notwithstanding anything hereinafter contained.]

Held, also, that the issue of the shares of the new capital was illegal, as the resolution to increase the capital had not been come to in accordance with the articles of association. It was, therefore, open to the company to set aside the resolution of 5th November 1884. When it was set aside, the persons who held the new shares ceased to be shareholders, and could not, therefore, be held liable as contributories.

[163] APPEALS from the orders of J. B. Alcock, District Judge of Surat, in the matter of settling the list of contributories of the Nawab of Beyla Spinning, Weaving and Manufacturing Company, Limited, in liquidation.

The company was formed and registered in 1881 under the Indian Companies' Act X of 1866.

The original capital of the company consisted of four lakhs of rupees, divided into 1,600 shares of Rs. 250 each.

In November 1882, the capital of the company was increased by a lakh of rupees by the issue of 1,600 shares of Rs. 62-8-0 each.

The resolution to increase the capital was not passed, in accordance with the articles of association, under which "the sanction of a special resolution of the company passed in a general meeting" was required before the capital could be increased. No such sanction was obtained for the issue of the new shares.

On 5th November 1884, a general meeting of the company was held, at which a resolution was passed calling on each share-holder to take up one additional share either of the original or of the new capital for every two shares originally held by him. The material portion of the resolution was to the following effect:—

"At present there are in the company's hands 459 shares of the original capital of Rs. 250 each, and 1,027 shares of the increased capital of Rs. 62-8-0 each. The present shareholders must take up the unallotted shares in the proportion (of one share for every two shares already held). The shareholders must pay the whole of the amount due on the said shares within eight days from this date and take the shares."

In pursuance of this resolution the appellants, in common with the other shareholders, took up a certain number of shares of the original as well as of the new capital.

On 19th October 1885, it was resolved at a general meeting of the shareholders to set aside the resolution of the 5th November 1884, and all acts done under that resolution. This resolution was to the following effect:—

[164] "It is hereby resolved that the resolution (of the 5th November 1884) and the notices issued thereunder and all orders passed and acts done in connection therewith be set aside. And in order to return such amounts as have been paid by the shareholders under the said resolution, the same are to be credited to the names of such shareholders with interest at 12 annas per cent. per mensem from the date on which the same may have been paid by them; and when the company gets money, it is to pay to such shareholders all such moneys with interest as may stand credited in their names. And the company is to take back from the shareholders the share certificates issued to them under the said resolution hereby set aside. And the moneys received under the said resolution having been credited to the names of the shareholders, who may have paid them, are to be deducted from the capital account, and the shares taken back are to be shown as a balance in the capital account."

Accordingly on the 19th June 1886, the shares, which the appellants had taken in pursuance of the resolution of the 5th November 1884, were taken back and transferred from their names to the company, and the moneys which they had paid on those shares were credited to their account in the company's books.

On 30th October 1886, the Company was wound up by and under the order of the Court.

In settling the list of contributories of the company, the District Judge of Surat was of opinion that the resolution of the 19th October 1885, was illegal and *ultra vires*, as it had the effect of reducing the capital of the company without the formalities required by section 13 of the Indian Companies Act (VI of 1882), and also because the company had no power to purchase its own shares, in contravention of section 282 of the Act. He, therefore, held that the appellants were shareholders of the company at the date of its winding up, and as such liable to be placed on the list of contributories, in respect of all the shares they had taken up in pursuance of the resolution of the 5th November 1884.

Against this decision the present appeals were preferred to the High Court.

[155] *Kalabhai Lalubhai* (with *Manekshah Jahangirshah* and *Manchubhai Narsidas Choksi*) for Appellants :—The appellants are not liable in respect of the shares taken by them under the resolution of the 5th November. As to the new shares the resolution by which the capital of the company was increased was illegal and *ultra vires*. It was not a 'special resolution' as required by the articles of association. Nor was the resolution of the 5th November 1884, compelling the shareholders to take up additional shares against their will, legal and binding on the shareholders. The company saw its mistake in time, and cancelled this resolution. The lower Court has held that this could not be done, as it had the effect of reducing the capital. This view of the matter is clearly wrong. It was perfectly competent to the company to undo an illegal act, and cancel the new shares which had been illegally issued. We never acquiesced in the illegality; we are, therefore, not estopped from pleading it as a complete defence to the present proceedings. *Campbell's case*, L. R., 9 Ch., 1, has no application to the present case. If any person is estopped, it is the official liquidators as representing the company. It is not open to them to say that the resolution of the 19th October 1885, passed by the whole body of shareholders was null and void. That resolution does not effect, and was not intended to effect, a reduction of the capital of the company. It only transfers the shares back to the company, and amounts to an "investment by the company of its funds in its own shares" as provided by clause (j) of section 3 of the memorandum of association. The official liquidators cannot, therefore, impeach the exercise of this power as illegal or invalid—*In re Mercantile Credit and Financial Association*, 3 Bom. H. C. Rep., 125, O. C. J.; *Jehangir Rustumji Modi v. Shumji Ladha*, 4 Bom. H. C. Rep., 185, O. C. J.; *Sewell's case*, L. R., 3 Ch., 131; *Feiling's and Rimington's case*, L. R., 2 Ch., 714.

Ganpat Sadashiv Rao for Respondents (official liquidators) :—The shares in respect of which the appellants are placed on the list of contributories are partly shares of the original capital and partly of the new capital. As regards the shares of the original [156] capital, the resolution of the 19th October 1885, was absolutely null and void. The company had no power to take back these shares, and credit the shareholders with the monies they had paid on those shares. That had clearly the effect of reducing the original capital, and this could not be done except in accordance with section 13 of Act VI of 1882. It is admitted that the formalities prescribed by that section have not been complied with. The resolution, therefore, so far as it effects a reduction of the original capital, is illegal. It is, however, urged that the effect of the resolution is to invest the funds of the company in its own shares, and that clause (j) of section 3 of the memorandum of association empowers the company to make such an investment. The proper construction to put upon this clause in the memorandum of association would be that such investment can only be

made if there is actual cash in the hands of the company. But at the date of the resolution in question the company had no funds in its hands. It was deeply indebted. If there were no funds to invest, how could there be any investment at all? The object of the resolution was not to make the investment as suggested, but to cancel the shares and reduce the capital *pro tanto*. Such a reduction was illegal. Even if the transaction be treated as a purchase by the company of its own shares, it is still invalid. See section 249 of Act VI of 1882, and *Trevor v Whitworth*, 12 Ap. Ca., 409 at p. 437. Under either aspect of the case, the resolution of the 19th October 1885, should be treated as null and void.

As regards the shares of the new capital, there was, no doubt, an irregularity in the issue of these shares. But that will not relieve the shareholders from liability as contributories. They took the shares with full knowledge of the irregularity. They have acquiesced in it. They are, therefore, estopped from impugning the validity of the issue of the shares - *In re Miller's Dale and Ashwood Dale Lime Company*, 31 Ch. D., 211; *Challis' case*, L. R., 6 Ch., 266; *Hare's case*, L. R., 4 Ch., 503; *Stace and Worth's case*, *ibid.*, 682; *Campbell's case*, L. R., 9 Ch., 1; *Sewell's case*, L. R., 3 Ch., 131.

[157] **Sargent, C. J.** :—The question in these appeals from the orders of the District Judge directing the appellants to be retained on the list of contributories turns upon the legal effect of the proceedings of the company commencing in 1882 and down to 10th October 1886, when the order for winding up the company began to operate. It appears that in 1882, the company being anxious to extend its business, the directors passed a resolution that each of the shareholders should take up a new share of Rs. 62-8-0. Some shares were accordingly taken up under this resolution; but the requisite capital not being forthcoming, a general meeting of the company was held on the 5th November 1884, on which occasion it was resolved that the shareholders should take up the 459 shares of the original capital at Rs. 250 per share and 1,027 shares of increased capital at Rs. 62-8-0 then in the hands of the company in proportion to the shares held by them, and in pursuance of that resolution a great many shares of the original and new capital were taken up, both of which form the subject of one or other of the present appeals.

The shares in respect of which it is sought to place the appellants on the list of contributories were taken up in pursuance of that resolution. However, on the 19th October 1885, at a general meeting it was resolved "that the resolution of 5th November 1884, and the notices issued thereunder and the orders passed and all the acts done in connection therewith be set aside, and in order to return such amounts as had been paid by the shareholders under the said resolution it was resolved that the same should be credited to the names of such shareholders with interest whatsoever it might amount to at 12 annas per cent. per mensem from the date on which the same might have been paid by them, and when the company should get money it should pay such shareholders all such moneys and interest as might stand credited in their names, the company to obtain receipts from them and to take back from the shareholders the share certificates granted to them under the said resolution so set aside, the moneys received having been credited to the names of the shareholders who may have paid them to be deducted from the capital account and the shares taken up to be shown as a balance in the capital account." The important question in the case is as to [158] the effect of this resolution on the shares taken up by the resolution of 5th November 1884.

First, we will consider its effect on the shares which formed part of the original capital. They could of course be issued whenever the company might

think proper, but when issued they became part of the capital of the company, which could only be subsequently reduced by complying with the provisions of section 13 of the Companies Act of 1882, which was admittedly not done in this case. But it was said that what was intended to be done by the resolution of October 1885, was the extinguishment or cancellation of shares, and was not in form a reduction. It is plain, however, that it would virtually be a reduction, as pointed out by Lord Justice JAMES in *Hope v. International Financial Society*, 4 Ch. D., 327. Referring to the transaction of that society he says: "It was either a purchase of shares in the sense of trafficking in shares, which is a purchase not authorised by the memorandum of association," or "it is an extinguishment of shares and, therefore, a reduction of capital." These remarks are referred to with approval by Lord HERSCHELL in the important case of *Trevor v. Whitworth*, 12 Ap. Ca., 419. Again, it has been contended for the appellants that the resolution operated as an investment by the company of its funds in its own shares, and which, it was said, was authorized by sub-clause (j) of section 3 of the memorandum of association, which provides that among the objects for which the company was established "was to invest the funds of the company from time to time in the shares of the company, provided that the company shall at no time hold more than one-fourth of the total number of shares for the time being of the company." In answer to this it has been argued for the official liquidators that such a power of investment by the company being virtually a power to purchase its own shares was *ultra vires* although found in the memorandum of association. There is no express decision of the English Courts, although a strong opinion was expressed by Lord MACNAGHTEN to that effect in *Trevor v. Whitworth*, 12 Ap. Ca., 419. It is true that by section 249 of the Act of 1882 a purchase by a company of its own shares is strictly forbidden, which Act was in force when the transaction in [189] question took place; but every "right acquired" under the Act of 1866, which would, we think, include a right of the company to invest in its own shares under its memorandum of association registered under that Act, was saved by clause (b) of section 2 of the Act of 1882. However, it is not necessary, in the view we take of the transaction, to express a decided opinion as to whether such a power of investment could have been validly exercised in 1885, as we are clearly of opinion that the transaction in question cannot be sustained as an investment, but that it was really an extinguishment of the shares. The resolution is distinct in its terms as undoing what had been done in November 1884, with a *restitutio in integrum*—the money was to be returned with interest to the shareholders, and the share certificates taken back by the company, and the shares "shown as a balance in the capital account." There was no intention of re-issuing these shares, and the result of the resolution, if carried out, would, therefore, have been, not an investment of the funds of the company in its shares, but the extinguishment of the capital represented by those shares. This is clearly pointed out by the present Master of the Rolls in *Hope v. International Financial Society*, 4 Ch. D., at p. 340, and by Lord HERSCHELL in *Trevor v. Whitworth*, 12 Ap. Ca., at p. 419. It is impossible, therefore, in our opinion to say that the resolution operated as an investment of the company's funds in its shares, and we must, therefore, decide that the holders of such shares were properly placed on the list of contributories to the extent of so much of the Rs. 250 on each share as had not been already paid to the company at the time of the winding up.

As to the shares of the issue of new capital, they stand on a different footing. That issue was admittedly invalid, the resolution to increase the capital not having been come to in accordance with sections 4 and 5 of the articles of

association,—that is, “with the sanction of a special resolution of the company passed in general meeting.” The shares, therefore, not having been validly issued by the company, and the invalidity not having been subsequently cured, as was done in *Sewell's case*, L. R., 3 Ch. at p. 139, they never became a legal part of the capital of the company; and it [160] was, therefore, in the power of the company by a resolution of a general meeting to set aside the resolution of November 1884, so far as that issue of shares was concerned, and validly undo what had been done under that resolution. This was effected by the resolution of 19th October 1885, which set aside all that had been done under the resolution of 5th November 1884, and virtually cancelled the shares issued under it. The persons who had taken up these shares ceased then to be holders of the shares and became creditors of the company in respect of the moneys they had paid on the shares and for which they were credited in the company's books in June 1886; they cannot, therefore, be regarded as having been shareholders in respect of those shares when the winding up commenced. This case differs, therefore, from *In re Miller's Dale and Ashwood Dale Lime Company*, 31 Ch. Div., at p. 215, where there had also been an invalid increase of capital, but which had never been undone, and the shareholders who sought not to be placed on the list of contributories had kept the shares which had been invalidly issued for several years and were on the list of shareholders when the winding up commenced.

We must, therefore, reverse the orders appealed from of the Court below and send back the cases for fresh decisions having regard to the above remarks. Costs to abide the result.

Orders reversed.

NOTES.

[This was followed in (1895) 20 Bom., 654; see also (1912) 14 Bom. L. R., 521.]

[18 Bom. 160]

APPELLATE CIVIL.

The 20th February, 1893.

PRESENT:

MR. JUSTICE BAYLEY, (ACTING CHIEF JUSTICE), MR. JUSTICE JARDINE,
AND MR. JUSTICE TELANG.

Chunilal Vithaldas.....(Original Defendant No. 2) Appellant
versus

Fulchand.....(Original Plaintiff) Respondent.*

*Mortgage—Marshalling of securities—Notice of prior mortgage
to subsequent mortgagee—Doctrine of marshalling
applicable to mortgages in the Mofussil.*

Before the extension of the Transfer of Property Act, 1882, to the Bombay Presidency, where two properties had been mortgaged to one person, and one of them was subsequently mortgaged to another person with notice of the former mortgage,

Held, such subsequent mortgagee had an equity to call for a marshalling of the securities in his favour so as to require the first mortgagee to proceed to realise [161] his security in the first instance out of the property not mortgaged to the second mortgagee. *Jardine, J., diss.*

The English doctrine of marshalling of securities applies to mortgages in the Mofussil. **SECOND APPEAL** from the decision of the First Class Subordinate Judge with appellate power at Ahmedabad, in Appeal No. 11 of 1890.

Baria Pahadbhai Jalumji mortgaged two fields (Survey Nos. 83 and 695) to Vithaldas Bhagvan for Rs. 2,000 by a *san-khat* dated 15th November 1876.

After the death of Vithaldas, his son Chunilal (defendant No. 2) and his grandson (the plaintiff) made a division of their joint family property. At that division the mortgage-debt due under the *san-khat* of 1876 was divided equally between the plaintiff and Chunilal (defendant No. 2).

In 1888 Chunilal obtained from the mortgagor a fresh mortgage-bond for his share of the debt due under the *san-khat* of 1876, and, by this new mortgage, field No. 83 alone was mortgaged.

Plaintiff then filed the present suit to recover his half share of the debt secured by the *san-khat* of 1876 and prayed for the sale of both the fields (Survey Nos. 83 and 695) included in the *san-khat*.

Defendant No. 1 (the mortgagor) pleaded that under the second mortgage-bond of 1888, which he had executed in favour of Chunilal (defendant No. 2), the latter had agreed to satisfy the plaintiff's half share of the debt, and that, therefore, he (the defendant No. 1) was not liable for the claim.

Chunilal (defendant No. 2) pleaded (*inter alia*) that the plaintiff must first proceed against field No. 695, and that, if any part of the money due to him remained unpaid, he might then be allowed to enforce his mortgage lien against the other field (No. 83), which was included in his own further mortgage of 1888.

The Subordinate Judge passed a decree for the plaintiff for Rs. 1,467-6 and costs to be realised by the sale of half of each of the two fields (Nos. 83 and 695), allowing the remaining half of both fields to defendant No. 2 for the portion of the debt due to him.

[162] On appeal, the Lower Appellate Court was of opinion that the English doctrine of "marshalling of securities" was not applicable to mortgages in the Mofussil, and following *Lala Dilawar Sahai v. Dewan Bolakiram*, I. L. R., 11 Cal., 258 and *Tadigotta Timmappa v. Lakshamma*, I. L. R., 5 Mad., 385, held that Chunilal was not entitled to compel the plaintiff to proceed first against field No. 695. As a puisne mortgagee he had, however, a right to redeem plaintiff's mortgage.

The decree of the Subordinate Judge was, therefore, varied by declaring that Chunilal (defendant No. 2) had a right to redeem the plaintiff's mortgage on payment of Rs. 1,467-6-0 within three months from the date of the decree. On failure to redeem as directed, the plaintiff was at liberty to recover his debt by sale of both fields Nos. 83 and 695.

Against this decision Chunilal (defendant No. 2) preferred a second appeal to the High Court.

Rao Saheb Vasudev J. Kirtikar for Appellant (defendant No. 2).

Gokuldas Kahandas Parekh and Nagindas Tulsidas for Respondent (plaintiff).

The following authorities were cited in argument:—

Ram Dhun Dhyr v. Mohesh Chunder Chowdhry, I. L. R., 9 Cal., 406; *Moro Raghunath v. Balaji Trimbak*, I. L. R., 13 Bom., 45; *Nawab Azimat Ali Khan v. Jowahr Singh*, 13 M. I. A., 404; *Gossyen Luchmee Narain Poori v. Biceram Singh*, 4 Cal. L. R., 294; *Lala Dilawar Sahai v. Dewan Bolakiram*, I. L. R., 11 Cal., 258; *Gaya Prasad v. Salik Prasad*, I. L. R., 3 All., 682; *Bhat Khushalji*

Kuber v. Hari Prasad, P. J. for 1888, p. 355; *Tadigotla Timmappa v. Lakshamma*, I. L. R., 5 Mad., 385; Macpherson on Mortgages, p. 326; Tagore Law Lectures on Mortgages, p. 299; Transfer of Property Act (IV of 1882), section 81⁴.

1st August 1892. JARDINE J.:—Defendant No. 1 mortgaged his two fields Nos. 83 and 695 to Vithaldas for Rs. 2,000 by a *sankhat*. After the death of Vithaldas, his heirs, the plaintiff and defendant No. 2, divided interest of the mortgagee between them, taking in moieties, each moiety being, like the mortgage itself, secured on both the fields mortgaged. Afterwards defendant [163] No. 2 obtained from defendant No. 1 (the mortgagor) a fresh mortgage for his moiety of the debt; and for this fresh mortgage the field No. 83, and not the field No. 695, was made security. When the present suit was brought by the plaintiff to recover his moiety of the mortgage-debt by sale of the two fields, defendant No. 2 called evidence to prove that the plaintiff had relinquished in his favour his right to proceed against No. 83. The lower Court of appeal has found, on the facts, that there was no such relinquishment.

The case differs from those for which the 81st section of the Transfer of Property Act (IV of 1882) will make provision when that Act is extended to this Presidency, as it only applies the equitable rule of marshalling to cases where the subsequent mortgagee is without notice of the prior mortgage. This is the rule as stated in the second volume of Fisher on Mortgage from *Lanoy v. Duke of Athol*, 2 Atk., 444. As Chunilal had notice of the original mortgage, the case of *Khetoosee Cherooria v. Banee Madhub Doss*, 12 Cal. W. R., 114, is in point. There, after suggesting a *quere* whether the doctrine of marshalling securities should be introduced into India, the learned Judges declined to apply it in the case before them.

It is said at p. 491 of Macpherson on Mortgages (7th Ed.) that there does not appear to be a case in which the doctrine of marshalling has been applied to Mofussil mortgages. The case does not resemble *Moro Raghunath v. Balaji Trimbak*, I. L. R. 13 Bom., 45, where equity was applied, because the mortgagee had himself become interested in the equity of redemption. In the case of *Tadigotla Timmappa v. Lakshamma*, I. L. R., 5 Mad., 385, the Court refused to apportion the debt, holding that the mortgagee was at liberty to claim that his security shall not be divided against his will. In *Indukuri Rama v. Yerramilli Subbarayudu*, I. L. R., 5 Mad., 387, the Court declined to deprive him of his legal rights. The English doctrine of marshalling is limited to cases where it will not prejudice the mortgagee's rights or improperly control his remedies. In the present case the [164] maxim "*sic utere tuo ut alienum non ledas*," on which Story in his Equity Jurisprudence, section 633, bases the doctrine, does not apply in derogation of rights, as defendant No. 2 at the time of the partition or afterwards might have made arrangements with the plaintiff.

I am of opinion that the lower Court of Appeal was right in declaring that the plaintiff might recover his mortgage-debt by sale of both the fields, and that the appellant, defendant No. 2, has no good reason to complain about the decree made, which I would, therefore, confirm with costs.

* [Sec. 81:—If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.]

But as I have the misfortune to differ from my learned brother, we refer the appeal, under section 575 of the Code, to the Acting Chief Justice.

1st August 1892. TELANG, J.:—The question which arises for decision in this case, on the facts found by the Court below, is whether when two properties are mortgaged to one person, and one of those properties is subsequently mortgaged to another person with notice of the former mortgage, such second mortgagee has any equity to call for a marshalling of the securities in his favour, so as to require the first mortgagee to proceed to realize his security, *in the first instance* out of the property not mortgaged to the second mortgagee. The Subordinate Judge with appellate powers has decided, that the puisne mortgagee in this case has no such equity, relying on the decision in *Lala Dilawar Sahai v. Dewan Bolakiram*, I. L. R., 11 Cal., 258. In that case, however, the subsequent mortgagee's contention, which was negatived by the Court, went a good deal further than the contention we have to deal with, for there as the Court points out, the defendants contended that "the plaintiff is *not entitled to a declaration* that the property is liable to attachment and sale, *unless he has shown* that he has exhausted the other property." The decision there consequently does not govern the present case. In the course of the judgment, however, reference is made to a case before Lord Chancellor SUGDEN, in which he pointed out, that while there might be a difficulty in working out a subsequent mortgagee's equity in England, where the prior mortgagee has "a right to compel [165] the debtor to redeem, or he may foreclose," it might be done in Ireland, "where the decree is ordinarily one not for foreclosure but for sale, and the mortgagee would be entitled to no more than his money, and the Court would deal with the surplus in such manner as it might think fit." This opinion of Sir E. SUGDEN is of very special authority in this Presidency, where, as WESTROPP, C. J., has laid down, the ordinary decree on a mortgage ought to be, as in Ireland, one, not for foreclosure, but for sale, and where the mortgagee is only entitled to his principal, interest and costs—*Ganpat v. Adarji*, I. L. R., 3 Bom., 312.

The learned Subordinate Judge relies also on two other authorities. The first of these—*Tadigolla Timmappa v. Lakshmanamma*, I. L. R., 5 Mad., 385,—appears mainly to have turned on an entirely different question than the one before us, namely, the question raised by the claim of the defendant there to split up the mortgage security, and pay only a part of the whole mortgage money proportionate to the share of the mortgaged property purchased by him. This the High Court did not permit. Besides, the question there was apparently raised when the plaintiff had already sold and himself purchased the property on which he and the defendant both had a claim. That was a period when it would be too late to raise any question of marshalling. In the other case, too, it would appear that the attempt of the party who stood in the position of a puisne incumbrancer was, in the language of the Court, to "deprive" the prior incumbrancer "of his legal rights," and to affect the interests of third parties which had been created in the course of their enforcement. For there, too, the prior incumbrancer had sold the property to a stranger. And before the sale no question of marshalling had been raised at all.

It is well established in England, that the rule of marshalling will not be applied in favour of a subsequent incumbrancer when that will either really prejudice the rights of the prior incumbrancer or the rights of third parties (2 W. and T. Leading Cases in Equity, pp. 111—8). And the cases now referred to were clearly well decided, according to that principle. Mr. Gokuldas, for the respondent, also relied on the case of [166] *Gaya Prasad v. Salik Prasad*, I. L. R., 3 All., 682. But it is difficult to say from the report what the real

decision of the Court was on the point now under consideration. PEARSON, J., was evidently in favour of marshalling so far as to direct that the plaintiff should first try to recover his amount by the sale of the property in the hands of the mortgagor, before he proceeded against the properties in the hands of the mortgagor's alienees, the second, third and fourth defendants—all of whom he placed on the same footing. It is not clear from the judgment of OLDFIELD, J., that he took the same view as regards the second defendant. But STRAIGHT, J. (p. 695, and see again p. 697) says that "the points upon which the difference of opinion has occurred between my two honourable colleagues relate to the claim of the plaintiffs as against defendants Nos. 3, 4" who were prior mortgagees as well as subsequent purchasers, while the second defendant's only title was under a subsequent purchase. It is to be remarked, further, with reference to one of the points made in that case, and which would have a bearing on the case before us, that the property sold to the plaintiff was sold, as Sir C. SARGENT points out in *Moro Raghunath v. Balaji*, I. L. R., 13 Bom., 45, by a private sale,—that is, as I understand, not by a sale for realizing the mortgage security; and, therefore, it was held, and if I may say so rightly held, that the defendants had no equity to compel the plaintiff to proceed to sell that property as if it was still liable to the mortgage. By the transaction of sale that property had become discharged from the mortgage lien before the second defendant had anything to do with any of the properties of the mortgagor, the first defendant.

If, then, the cases relied on are inapplicable, the question again arises, whether there is any such equity in favour of the subsequent mortgagee as is here claimed. In England, the doctrine is broadly laid down that such an equity exists. The cases go back ultimately to a decision of Lord HARDWICK, who laid it down that "if a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Court, in order to relieve the second mortgagee, has directed the first to take [167] his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons", 12 White and Tudor (6th Ed.), p. 102.] And the note of Mr Tudor points out that that statement of the doctrine is correct, except that the absence of notice is not an essential condition for its application. It is unnecessary to discuss, in detail, the authorities there referred to. They seem to bear out the view expressed, and in *Aldrich v. Cooper*, 2 White and Tudor (6th Ed.), p. 82, Lord ELDON nowhere refers to notice as in any way entering into the consideration of this equity. Further, it seems reasonable that this equity should be enforced, both in cases of notice and of no notice, because to refuse so to enforce it would have the effect not only of enabling the first mortgagee to disappoint a subsequent mortgagee—which is what the English cases say equity will seek to avoid—but also of frequently enabling the mortgagor to defraud such subsequent mortgagee. This result must generally follow, unless the help of another doctrine of equity is called in, and the subsequent mortgagee is allowed to stand as a creditor against the other property although not mortgaged to him, as, for instance, is done in those cases mentioned in the judgment in *Aldrich v. Cooper* and in the notes to that case, where the Crown taking mortgaged property under an extent, other property of the mortgagor not mortgaged, but against which the extent might have been enforced, is treated in equity as if it was subject to the mortgage.

* Compare the hint thrown out on a similar point in the judgment in *Udaram v. Ranu*,

It must be admitted, that under the Transfer of Property Act (IV of 1882) this equity is by section 81 made subject to the puisne incumbrance being without notice. But as the Act is not applicable to this case, we are not at present bound to adopt that rule as there laid down, and we may, I think, properly follow the rule laid down in England, which is not in any way unfair to the substantial claims of the prior incumbrancer, and which [168] avoids an injustice and possible fraud upon the rights of the puisne incumbrancer.

It is true that in *Khetoossee Cherooria v. Banee Madhub Doss*, 12 Cal. W. R., 114, the High Court of Calcutta made some remarks expressive of a doubt as to whether the equitable doctrine of marshalling should be applied in this country. These remarks, however, were merely made *obiter*, and were not intended to be decisive on the point. On the other hand, I think the doctrine is one of justice, equity and good conscience, and I see no objection to its application within due limits. And it may be pointed out, that the doctrine has, in fact, been already applied by this Court, even in cases of partition of Hindu family property—cases which the Courts are bound to decide according to Hindu law pure and simple. A purchaser or mortgagee for value of the share of an individual co-parcener in joint family property, even with notice that he is buying such a share, has been held entitled to have the family property marshalled in his favour, so far as that can be done "without doing injustice to prior incumbrancers or co-parceners." This decision can only rest, I think, on the equity administered by the English Courts, as above explained, and must have been adopted to avoid the possible fraud to which I have adverted.

In the present case, there is no finding or proof or even allegation that any injury may be occasioned to the defendant by his having to sell, in the first instance, the property which is not mortgaged to the plaintiff. I am, therefore, of opinion that the Judge below was wrong in refusing to give the appellant the relief which he sought, except in so far as he claimed to redeem the respondent's mortgage. To that relief he was, no doubt, entitled. But he was also entitled, I think, to a decree declaring that, in the event of the appellant's failure to redeem as provided by the Subordinate Judge's decree, the plaintiff would be at liberty to sell the property mortgaged to him, but subject to the proviso that he must first sell the field No. 695 which is not mortgaged to the appellant, and only proceed against the other field in the [169] event of the proceeds of the first sale not being sufficient to satisfy the amount of his decree.

The Judges having differed in opinion, the case was referred to the then Acting Chief Justice (BAYLEY, J.) and was argued before him on the 13th December 1892.

Rao Saheb Vasudeo J. Kirtikar, for Appellant (Defendant No. 2):—The question is whether, when the subsequent mortgagee has notice of a prior mortgage, he has any equity to require the prior mortgagee to proceed in the first instance against such of the mortgaged property only as is not comprised in the subsequent mortgage. We contend that although we had notice we have a right to call for a marshalling of the securities in our favour. The doctrine of marshalling applies in India. The following authorities were referred to:—*Moro Raghunath v. Balaji*, I. L. R., 13 Bom., 45; *Nawab Azimat Ali Khan v. Jowahir Singh*, 13 Moo. Ind. Ap., 404; *Nanee Tara Naikin v. Allarakhia Soomar*, I. L. R., 4 Bom., 573 (note); Story's Equity Jurisprudence, 634 (a); Ghose on Mortgages, p. 299; 2 White and Tudor's Leading Cases (6th Ed.), p. 109; *Heyman v. Dubois*, L. R., 13 Eq., 158; *Hughes v. Williams*,

* *Wannaji v. Atmaram*, P. J., 1883, p. 337; see Mayne's Hindu Law, pl. 329; *Senkatarama v. Meera Labai*, I. L. R., 13 Mad., 275.

3 Mac. and G., 683; *Liverpool Marine Credit Co. v. Wilson*, L. R., 7 Ch., 507; *Idd v. Lister*, 3 DeG. M. and G., 857; *Bishonath v. Kisto Mohun*, 7 Cal. W. R., 483; *Mussamat Nowa Koowar v. Sheik Abdul Ruheem*, Cal. W. R., 1864, p. 374; *Nanabhat v. Lakshman*, P. J., 1877, p. 83.

Goulds K. Parekh, for Respondent (Plaintiff):—We contend that in India the doctrine of marshalling securities has not been adopted where the subsequent mortgagee has had notice of the prior mortgage. In this case there was notice—*Lala Dilawar Sahai v. Dewan Bolakiram*, I. L. R., 11 Cal., 258; *Tadigolla Timmappa v. Lakshamma*, I. L. R., 5 Mad., 385; *Indukuri Rama v. Yerramilli*, *ibid.*, 387; *Fisher on Mortgage* (4th Ed.), p. 667; *Lanoy v. Duke of Athol*, 2 Atk., 446; *Rodh Mal v. Nam Harakh*, I. L. R., 7 All., 711.

[170] *Rao Saheb Vasudeo J. Kirtikar* in reply:—In the case of *Nanabhat v. Lakshman*, P. J., 1877, p. 83, there was notice, yet marshalling was allowed—*Toolsee Ram v. Munno Lall*, 1 Cal. W. R., 553.

Cur. adv. vult.

20th February 1893 **Bayley, C. J** (Acting):—The question for decision in this appeal is, whether when two properties are mortgaged to one person, and one of them is subsequently mortgaged to another person with notice of the former mortgage, such second mortgagee has any equity to call for a marshalling of the securities in his favour so as to require the first mortgagee to proceed to realise his security in the first instance out of the property not mortgaged to the second mortgagee.

The first mortgage was dated the 15th November 1876. By section 81 of "The Transfer of Property Act, IV of 1882" this equity is made subject to the second mortgage having been made without notice of the former one, but that section has no application to this case, as the Act was not extended to the Bombay Presidency until the 1st January 1893, (Notification, dated the 27th October 1892, by the Government of Bombay)

Although it is said in Macpherson on Mortgages, page 491 (7th Ed.), that there does not appear to be any case in which the doctrine of marshalling has been applied to Mofussil mortgages, and although a doubt was expressed by the High Court at Calcutta in 1869 as to whether the doctrine of marshalling of securities ought to be introduced into India, and thereby (as the Court said) to interfere with the legal rights of parties—see *Khetwoose Cherooria v. Banee Madhub*, 12 Cal. W. R., 114,—I entertain no doubt that such doctrine has been so introduced.

In two cases which came before Mr. Justice COUCH and his colleagues in the High Court of Bombay in 1865, *viz.*, *Dada v. Babaji*, 2 Bom. H. C. Rep., at p. 38, and *Webbe v. Lester*, 2 Bom. H. C. Rep. at p. 55, it was held that although the English law is not obligatory upon the Courts in the Mofussil, they ought, in the absence of special law and usage, in deciding a case according to "justice, equity and good conscience" (Regulation IV of 1827, section 26), to be guided by the principles [171] of English law applicable to a similar state of circumstances. The Courts, however, will not, in such a case, apply rules of English law, which, though well established and binding on English Courts, are yet so special in their nature and origin as to be inapplicable to the different circumstances of this country, and accordingly the Court of First Instance (Ordinary Original Civil Jurisdiction) refused to apply the rule in *Shelley's case* to an agreement by the members of a Parsi family relating to an estate in the Island of Salsette, in the Mofussil of this presidency—see *Mithibai v. Limji Nowroji Banaji and*

others, I. L. R., 5 Bom., 506, a decision which was affirmed in the Court of appeal (I. L. R., 6 Bom., 151)—both Courts holding that such well-established rule was a law of property or tenure based on feudal considerations and was unsuited to the circumstances of India. It is unnecessary for me to point out, in detail, what Mr. Justice TELANG has already done, and I venture to think correctly, in his judgment in this case, that the authorities relied on by Mr. Goculdas K. Parekh, the pleader for the respondent (original plaintiff in the Court below), are inapplicable and may be distinguished from the present case. I am of opinion that there is such an equity in favour of the subsequent mortgagee (the present appellant) as is claimed on his behalf. In the argument before me I did not understand it to be denied that the doctrine of marshalling had been applied in the Courts in India, but it was urged that it had not been carried further than that it is applicable where the second mortgagee had no notice of the first mortgage. No doubt in the case before Lord HARDWICK (Lanoy v. The Duke of Athol, 2 Atk. at p. 446), reference is made to the second mortgagee having no notice of the first mortgage, but subsequent decisions pay no regard to the absence of such notice, and do not refer to notice as in any way entering into the consideration of this equity. In the note in Tudor's Leading Cases in Equity, Volume 2, page 109, (6th Ed., 1886) Mr. Tudor says that it seems to be immaterial whether the second mortgagee has notice of the first mortgage or not. In the leading case of *Aldrich v. Cooper*, 8 Vesoy., 381, decided by Lord Chancellor ELDON in 1803, he says (p. 388) 'If a party has two funds, a person having an interest in one only has a right in equity to compel the former to resort to the other if that is necessary for the satisfaction of both.' See also at page 394 the instances he gives of the rule that a person having a double fund shall not by his option disappoint another who has only one. In *Baldwin v. Belcher*, 3 Dru. and War., 173, the Lord Chancellor of Ireland (Sir EDWARD SUGDEN, afterwards Lord ST. LEONARDS) states the rule without any qualification. He says: 'The rule of law is perfectly settled. If there are two creditors who have taken securities for their respective debts, and the security of the first creditor ranges over two funds, while the security of the other is confined to one of those funds, the Court will arrange or marshal the assets, so as to throw the person who has two funds liable to his demand on that which is not liable to the debt of the second creditor.' In *Gibson v. Seagrim*, 20 Beav., 614, two properties X and Y were mortgaged to A, and afterwards X was mortgaged to B. The Master of the Rolls held that B was entitled to have the securities marshalled so as to throw A's mortgage, in the first instance, on estate Y. See also *Re Mower's Trusts*, I. R., 8 Eq., 110, to the same effect.

The learned pleader for the appellant, Rao Sahib Vasudev Jagannath Kirtikar, cited two passages in Ghose's Tagore Lectures for 1875-76, page 299, where it is stated that the doctrine of marshalling had been adopted by the Courts in India as a rule founded in equity and good conscience, and that although in some of the earlier cases it was laid down that marshalling could not be insisted on by an incumbrancer with notice of the prior mortgage (*Lanoy v. The Duke of Athol*, 2 Atk., at p. 446), the rule was considered too narrow, and that the distinction had since been abolished (*Gibson v. Seagrim*, 20 Beav., 614; *Tidd v. Lister*, 10 Hare., 140 at p. 157). The appellant's pleader relied upon a decision of MELVILL and KEMBALL, JJ., in *Nanabhat v. Lakshman*, P.J. for 1877, p. 83, as a case of marshalling with notice of the first incumbrance. As it is difficult to collect what are the facts of the case from that report, I have examined the record and the notes of the argument in Mr. Justice MELVILL'S note book. From [173] these it appears that Lakshman (original defendant No. 1) on 3rd January 1868, mortgaged certain trees on his land to Nanabhat (original plaintiff).

to secure Rs. 150 then borrowed, payable in two years. The suit was brought on the 3rd January 1876, to recover the above sum, and a like sum for interest, or to recover possession of the mortgaged trees. The mortgage bond had been registered in Book I relating to immoveable property. Nanabhat in Suit No. 51 of 1870 sued Lakshman for Rs. 100, and on the 15th March 1870, obtained a decree, attached the field and trees, besides other property. A prohibitory order of 23rd January 1871, published on the 11th February 1871, expressly mentioned the mortgage. On the 6th July 1871, the property was purchased by Vishnu Gopal, who, on the 6th September 1871, sold to Narayan, father of Vaman (original defendant No. 2). The Subordinate Judge found that the bond was proved, that the plaintiff had not possession of the mortgaged trees, and only decreed that plaintiff should recover Rs. 300 from Lakshman, and dismissed the claim against Vaman, laying his costs on plaintiff. The District Judge confirmed the decree with costs.

The plaintiff appealed to the High Court on, amongst others, the following grounds:—(1), that the lower Court had erroneously held that the mortgaged property (*viz.*, 9 mango and 20 babul trees) was moveable property; (3), that the lower Court erroneously held that the appellant's lien upon the trees would not follow the trees into the hands of the purchaser at a Court sale, who had purchased the trees with full notice of the mortgage lien; (4), that the judicial sale of the trees having been clearly made subject to the mortgage lien, the purchaser was bound to pay the mortgage amount on the trees.

For the appellant it was argued before MELVILL and KEMBALL, JJ., that registration was sufficient notice, and that, at any rate, the auction-purchaser was bound even if the sale had not been made expressly subject to the mortgage. On the other side, it was contended that the land was not mortgaged, only the trees, and that by Act XX of 1866 standing timber is moveable property, and that plaintiff ought to recover his debt from the whole moveable property.

[174] The Court delivered the following judgment:—

"If notice be necessary, in order to affect a purchaser at a Court sale, the registration of the plaintiff's mortgage bond was sufficient notice. Vishnu Gopal purchased both land and trees at the auction sale, and if he had searched the register, as he was bound to do, he would have ascertained the existence of the plaintiff's lien on the trees by virtue of his mortgage bond, which was registered in Book I relating to immoveable property. Under these circumstances, we consider that the plaintiff's lien upon the mortgaged property remains valid, though in execution he should be obliged to proceed, in the first instance, against any portion of the mortgaged property which may remain in the hands of the mortgagor before he proceeds against any of the property held by the defendant Vaman. If the defendant Vaman or his father has made away with any of the trees, he is liable for their value, which must be ascertained at the time of the execution. We amend the decrees of the Courts below, and award the plaintiff's claim for Rs. 300, and direct that the same be recovered from the defendant Lakshman personally, or from the mortgaged property, and also from the defendant Vaman personally, to the extent of the value of any of the mortgaged trees which may have been cut down after the land came into the possession of his father Narayan. Costs on defendants throughout."

It will thus be seen that the High Court considered that the plaintiff's lien upon the mortgaged property remained valid, though in execution he should be obliged to proceed, in the first instance, against any portion of the mortgaged property which might remain in the hands of the mortgagor before he proceeded against any of the property held by the defendant Vaman,—that

is, it compelled the plaintiff to proceed against his mortgagor and such mortgagor's property before he proceeded against Vaman, the son of Narayan, who had purchased from Vishnu Gopal the auction-purchaser. The Court in that manner arranged or marshalled the assets available for the satisfaction of the original mortgage lien of the 3rd January 1868.

In the present case, as pointed out by Mr. Justice TELANG, there is no finding, or even allegation, that any injury will be occasioned [175] to the prior incumbrancer by his having to sell, in the first instance, the field which is not mortgaged to the appellants.

For the above reasons, I am of opinion that the view taken by Mr. Justice TELANG is the correct one, and I concur in the form of the decree which he proposes should be made. Appellant to have his costs throughout.

Decree varied.

NOTES.

[This was followed in (1896) 22 Bom., 304.]

[18 Bom. 175]

APPELLATE CIVIL.

FULL BENCH.

The 23rd February, 1893.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

Shantappa Chedambaraya... Auction-purchaser
Subrao Ramchandra Yellapur.....Decree-holder
Rayapa Shivapa Sheti.... Judgment-debtor.*

Stamp—Stamp Act (I of 1879), Sch. I, Arts. 16-21—Decree—Execution—Sale of property subject to mortgage—Valuation of property sold—Computation of purchase-money—Certificate of sale—Proclamation of sale—Mortgages noted in proclamation of sale—Civil Procedure Code (Act XIV of 1882), Secs. 282-287.

Mortgages noted in the proclamation of sale as claims upon the property sold, should not be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under section 282 of the Civil Procedure Code (Act XIV of 1882), to be charges on the property, and the Court has seen fit to sell it subject to them, but they should be entered in the certificate and computed as part of the purchase-money if they have been thus admitted or established, or if they have been declared under section 282 of the Civil Procedure Code (Act XIV of 1882), and the sale has been held subject to them.

Claims admitted by parties or established by the decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the

* Civil Reference. No. 16 of 1892.

Knowledge of the Court in an enquiry under section 287 only, and have not been made the subject of an order under section 287 of the Civil Procedure Code (Act XIV of 1882).

THIS was a reference made by Rao Sahib H. S. Phadnis, Subordinate Judge of Kumta in the Kanara District, under section 49 of the Stamp Act (I of 1879) and section 617 of the Civil Procedure Code (Act XIV of 1882).

[176] One Subrao Ramchandra Yellapur obtained a decree against Rayapa Shivapa Shetti and in execution attached and sold certain property subject to four different mortgages. The property was purchased at the Court sale by one Shantappa Chedambaraya, who was the holder of one of the four mortgages. He applied for a certificate of sale, and relying upon the decision in *In re Ramkrishna*, I. L. R., 9 Bom., 47, contended that his mortgage and one of the other three mortgages should not be inserted in the certificate of sale and computed as purchase-money, as they had not been admitted by the parties or established by the decree of a Court. The Subordinate Judge, being of opinion that the decision relied on was irreconcilable with the ruling in *Sha Nagindas v. Halalkore Nathwa*, I. L. R., 5 Bom., 470, referred the following questions:—

"I. Should not the mortgages specifically noted in the proclamation of sale as being charged upon the property sold, be so entered in the certificate of sale, and be computed as part of the purchase-money?

"II. Should claims admitted by the parties, or established by the decree of a Court, be entered in the proclamation of sale as charges upon the property to be sold, supposing they have come to the knowledge of the Court in an inquiry made under section 287 only, but are not covered by an order under section 282?"

The opinion of the Subordinate Judge on the first question was in the affirmative and on the second in the negative.

There was no appearance for the parties.

The reference was decided by a Full Bench consisting of SARGENT, C. J., and CANDY and FULTON, JJ.

Judgment:—We think that the first question, put by the Subordinate Judge, should be answered by saying that mortgages, noted in the proclamation of sale as claims upon the property sold, should not necessarily be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under section 282 of the Civil Procedure Code, to be charges on the property and the Court has seen [177] fit to sell it subject to them, but that they should be entered in the certificate, and computed as part of the purchase-money, if they have been thus admitted or established, or if they have been declared, under section 282 of the Civil Procedure Code, and the sale has been held subject to them.

As regards the second question, we consider that claims admitted by the parties, or established by decree of a Court, should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an enquiry under section 287 only, and have not been made the subject of an order under section 282 of the Civil Procedure Code.

Order accordingly.

NOTES.

[The Amending Act, 1894, enacted that nothing in sec. 24 should apply to a certificate of sale mentioned in the corresponding Articles 16; the word 'only' was added after the word 'purchase-money' in the second column of that Article. These provisions are repeated in the Stamp Act, 1899.]

[18 Bom. 177]
APPELLATE CIVIL.

The 27th February, 1893.

PRESENT:

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE RAYLEY.

Parvati and another, minors.....(Original Plaintiffs) Appellants

versus

Ganpatrao Balal and others.....(Original Defendants) Respondents.*

Hindu law—Joint family—Manager—Gift by manager of part of family property—Illegitimate daughters—Maintenance—Gift—Alienation of family property—"Dasiputra" (son of a slave.)

Ramchandra, the manager of an undivided Hindu family, gave certain shares in a spinning and weaving company, which had been purchased out of family funds, to Ganesh for and on behalf of the plaintiffs, who were Ramchandra's illegitimate daughters. After the death of Ramchandra and Ganesh, Ramchandra's illegitimate daughters sued the surviving members of the family for a declaration that the shares belonged to them, and that they had a right to have them transferred to their names in the company's books.

Held, without deciding whether illegitimate daughters are entitled to simple maintenance from the family property, in any case, Ramchandra, as manager, could not alienate the shares for that purpose, as there were no emergent circumstances requiring it.

APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona.

The plaintiffs were the minor illegitimate daughters of one Ramchandra Ganesh, deceased. They sued the defendants, who were the legitimate sons of Ramchandra, for a declaration that [178] certain shares in the Morarji Goculdas Spinning and Weaving Company belonged to them, and that they had a right to have these shares transferred to their names in the books of the company.

They alleged that the deceased Ramchandra in 1876 had given these shares to one Ganesh Bapuji for and on their behalf; that he had intended to transfer them into the name of one Ganesh Bapuji Marathe, who passed an agreement to the plaintiffs that he held the shares for them and on their behalf, and that the company declined to transfer the shares to the plaintiffs' names owing to the defendants' opposition. They prayed, therefore, for the above declaration and for an injunction restraining the defendants from interfering with the plaintiffs' rights and from drawing the dividend on the said shares.

The defendants Balvant, Sadashiv and Hari, sons and representatives of the deceased Ramchandra Ganesh, pleaded (*inter alia*) that the suit was time-barred, that Ramchandra was not competent to alienate the shares, which had been purchased out of the family funds, and that the gift being incomplete was invalid.

At the hearing it was proved that the family was joint, and that the shares had been purchased out of the family funds. Ganesh Bapuji had died in 1880. The Subordinate Judge disallowed the claim, holding that the gift to the plaintiffs was not proved, and that the donor Ramchandra had no authority to make the gift. In his judgment he said:—

"The facts which have been proved beyond all doubt are these:—That the defendants' family was joint; that the shares in dispute were purchased with

the ancestral funds belonging to the joint family by Ramchandra; that the said Ramchandra attempted to make a gift of these shares to Ganesh Bapuji that he wrote to the secretaries and treasurers of the Morarji Goculdas Spinning and Weaving Company to transfer these shares to Ganesh Bapuji's name, which they refused to do owing to the defendants' objections; that Ganesh Bapuji brought a suit claiming those two shares as his; that the costs of that suit were defrayed by Chimma, the plaintiffs' guardian; that [179] Chimma herself claimed the shares from the company as hers. These facts undoubtedly disprove the assertion that the shares were given in gift to the minor plaintiffs as alleged by them. It is for them to prove their assertion that these shares were given to them as alleged, and that the gift was completed by the necessary formalities. These the plaintiffs have clearly failed to prove. Were it otherwise, the shares were purchased with joint ancestral funds by Ramchandra. Hence he cannot make a gift of those shares as against his co-owners, who not only did not give their consent, but actually repudiated the transaction.

The plaintiffs appealed.

Inverarity (with *Balaj Abaji Bhagavat*) for the Appellants (plaintiffs): — The management of the family property was in the hands of Ramchandra, who purchased the shares in dispute in his own name in or about November 1875. In the year 1876 he was ill and desired to go on a pilgrimage to Benares, where his father Ganpatrao was then living. The plaintiffs' mother Chimma had been Ramchandra's mistress for several years, and prior to his going to Benares he desired to make provision for the plaintiffs, who are his illegitimate daughters. He had a separate account in the family books, and he debited to himself the price of five shares and credited it in the accounts of the family. In fact, he bought five shares from the family estate. Out of them he gave two to Ganesh Bapuji orally upon a secret trust in favour of his daughters (the plaintiffs). In the year 1878, Ganesh passed an agreement in favour of the plaintiffs with respect to the shares. The Subordinate Judge has held that agreement to be proved. The question as to the gift has arisen in other judicial proceedings. The story as to the gift, therefore, is not a new one. The only question to be determined, then, is whether the gift was complete or not. The fact of the gift is not disputed. The contention is either that Ramchandra had no power to make the gift, or that the gift was incomplete. The lower Court wrongly held that there was no gift. The shares were given for the maintenance of the plaintiffs. The illegitimate children of a person belonging to the twice-born [180] class are entitled to maintenance; and the assignment in favour of the plaintiffs being complete, they are entitled to take the benefit of that assignment.

The delivery, by Ramchandra, of the share certificates to Ganesh and the execution of the transfers with the oral direction to Ganesh to hold the shares for the benefit of the minor plaintiffs show that there was a perfectly created trust valid in law. It could not be rendered incomplete by the fact that the name of Ganesh was not entered in the shareholders' register. Ramchandra having done everything in his power to get Ganesh's name registered, the trust was complete—*Lewin on Trusts*, page 66. The legal estate was divested from the settlor, and that was sufficient. When the owner creates a trust for the benefit of a third person by appointing a trustee, it is not necessary that the legal interest of the owner should be entirely divested from him if the trustee can acquire that legal estate without any further act on the part of the owner. When there is nothing further to be done by the donor, the gift is

complete—*In re Richards*; *Shenstone v. Brock*, 36 Ch. D., 541. It is not necessary for the purpose of passing the interest in the shares that the transfer should be registered—*Buckley on Companies* (6th Ed.), page 93; *Roots v. Williamson*, 38 Ch. D., 485; *The Societe General de Paris and G. Colladon v. Jenet Walker*, 11 Ap. Ca., 20.

Assuming that the legal estate did not pass to Ganesh, still under the circumstances the plaintiffs might have compelled the company to transfer the shares to their names under the articles of association. That being so, they could have asserted their right against Ramchandra even if he had been alive.

The rules as to a gift under Hindu law are not applicable to this transaction. We contend that the transaction is not a gift, but a mere transfer effected for the purpose of a legal object, namely, the maintenance of the minor plaintiffs, who, though illegitimate, are entitled to maintenance under Hindu law.

Jardine (with *Mahadeo Chimnaji Apte*) for the Respondents (defendants):—The shares were purchased by Ramchandra with [181] ancestral funds; they were, therefore, family property. At the time of the alleged transfer, Ramchandra, although the manager of the undivided family, had only a limited interest in the family estate which he could not give away even to the extent of his own share—*Ramanna v. Venkata*, 1. L. R., 11 Mad., 246; *Ponnusami v. Thatha*, 1. L. R., 9 Mad., 273; *Vasudev v. Venkatesh*, 10 Bom. H. C. Rep., 139; *Gangubai v. Ramanna*, 3 Bom. H. C. Rep., A. C. J., 66; *Lakshman Dada Nark v. Ramchandra Dada Nark*, L. R., 7 Ind. App., 181. Even assuming that there was legal or moral obligation for the gift, still the above authorities show that the gift was bad. But we contend that there was neither any legal nor moral obligation to support the plaintiffs, being illegitimate daughters. The Hindu texts lay down that it is only a *dasi-putra* (son of a slave) that is entitled to inherit—*Rahu v. Govind*, 1. L. R., 1 Bom., 97. Illegitimate sons may be entitled to maintenance, but illegitimate daughters are not. The word in all the texts being *dasi-putra* (son of a slave), it excludes a daughter. No doubt in the reported cases the words used are "illegitimate children," but none of the texts uses the word "children," the word throughout being *putra* (a son)—*Vyavahar Mayukha*, Ch. IV, sec. 14, pl. 29-32; *Daya Bhaga*, Ch. IX, pl. 28; *Mitakshara*, Ch. I, sec. 12; *Kripal Narain v. Sukurmoni*, 1. L. R., 19 Cal., 91. Even if the transaction in dispute be considered to be a gift, it is invalid according to Hindu law. The gift was not complete. It was argued that the transfer might have been compelled, but the thing to be considered is what was actually done. There was no transfer made, and Ganesh acquiesced in the objection raised by the company to the transfer. Ramchandra might have intended to make a gift which was not completed before his death. Such a gift is invalid—*Hirbai v. Jan Mahomed*, 1. L. R., 7 Bom., 229.

Inverarity, in reply:—In support of our contention that illegitimate daughters are entitled to maintenance, we rely upon *Salu v. Hari*, P. J. for 1877, p. 34; *Inderun Valungypooly Taver v. Ramasawmy Pandia*, 13 M. I. A., 141, at 159; *Sri Gayapathi Radhika Patta Maha Devi Garu v. Sri Gayapathi* [182] *Nilamani Patta Maha Devi Garu*, 13 M. I. A., 497; *West and Buhler*, pp. 263, 432. No doubt the word "son" occurs in the texts, but we contend that the word "son" should be held to include "daughter," as the word "brother" has been held to include "sister."

Sargent, C. J.:—The plaintiffs in this suit, who are the illegitimate children of one Ramchandra Ganesh, ask for a declaration that certain shares in the Morarji Gokuldas Spinning and Weaving Company, which had been purchased by their father, belonged to them, on the ground that they had been

given by him to one Ganesh Bapuji for and on their behalf. The Court below found that the gift to plaintiffs was not proved; that the shares were purchased with ancestral funds by Ramchandra, and that he could not make a gift of them without the consent of the defendants, who are his legitimate children; that the gift, if at all, was to Ganesh and not to the plaintiffs, and that the gift, in any case, was incomplete, and accordingly dismissed the suit.

The appellants (the plaintiffs) have not attempted to argue that the Court was not correct in its finding as to the family having been joint and the shares having been bought with ancestral funds. The first question, therefore, in this case is whether Ramchandra could give the shares to the plaintiffs, or rather to Ganesh in their behalf, supposing the gift to be one which the Court would otherwise give effect to.

Ramchandra, it is admitted, was acting as manager of the family whilst his father Ganpatrao Balal was at Benares, and it has been argued that the support of Ramchandra's illegitimate children by Chima was a legal obligation on the entire family, and that a gift by Ramchandra as manager for that purpose could not be impugned, but that, at any rate, it was good as an alienation of his own share for that purpose. There is, doubtless, express authority for holding that an illegitimate son of one of the family is entitled amongst the regenerate classes to maintenance. See *Chhoturaya Run Murdun Syn v. Sahul Purhulad*, 7 M. I. A., 18, and *Muttasawmy v. Vencataswara*, 12 M. I. A., 203 and indeed in the case of *Rahi v. Govind*, I. L. R., 1 Bom., at p. 102 WESTROPP, C. J., states it to be the result of the authorities that [183] amongst the three regenerated classes illegitimate "children" are entitled to maintenance. It is to be remarked, however, that the real question in that case was as to the meaning of '*dasi*' in the texts relating to the rights of illegitimate children, and that the authorities on which WESTROPP, C. J., relies in support of that statement, and which are mentioned in the note at page 102 only deal with the case of a '*dasi-putra*', i. e. illegitimate son. In the *Mitakshara*, Gh. I., sec. 12, cl. 3, Yajnavalkya is cited as saying that "the son begotten on a female slave does not obtain a share even by the father's choice, but if he be docile he receives a simple maintenance" and the same passage is referred to by the author of the *Mayukha* at Chapter IV, sec. 4, and it is on these authorities that Sir T. STRANGE in his *Hindu Law*, Volume 1, page 70, states the right of illegitimate "progeny" to maintenance. Unless, therefore, the expression "*dasi-putra*" can be held to include "daughter," there is no authority for a daughter having a claim to maintenance. It was said that a "son" is to be construed as including a daughter, as "brothren" was interpreted as including "sisters" by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak v. Lakshmibai*, 1 Bom. H. C. Rep., at p. 123, which was decided upon the authority of the *Mayukha*. Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and as the right to maintenance is laid down, in terms, in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters, we think, that they were not contemplated as having the same right.

But in any view of that question it is clear that the plaintiffs' claim to the shares is not sustainable. Even if the daughters were entitled to simple maintenance out of the family property it cannot be contended that it was within the power of Ramchandra, even as the *de facto* manager, to alienate the shares for that purpose, as there were no emergent circumstances requiring it.

The case of *Gangubai v. Ramanna*, 3 Bom. H. C. Rep., 66, shows this could not be done even in the case of a legitimate daughter.

[184] Lastly, as to the suggestion that the gift might be supported as an alienation of Ramchandra's interest in the family property, even if it could be regarded as an "alienation for value" so as to satisfy the decision in *Vasudev v. Venkatesh*, 10 Bom. H. C. Rep., at p. 160, it would be sufficient to say that such was not the plaintiffs' case. But independently of that objection it is plain, on the authorities, that a suit would not lie against the other members of the family to have the shares declared to belong to plaintiffs and transferred into their names.

* For these reasons, and without discussing the question whether there was such a possession by Ganesh as to create a valid gift by Hindu law, or whether the evidence suffices to establish that the gift was to Ganesh as a trustee for the benefit of the plaintiffs, we must hold that the plaint was properly dismissed, and confirm the decree with costs.

Decree confirmed.

NOTES.

[As regards the validity of gifts, see also (1900) 24 Bom., 563; (1902) 4 Bom. 2., 883; (1904) 29 Bom., 51.

As regards the meaning of "son," see also (1908) 32 Bom., 562 at 566.]

**[18 Bom. 184]
ORIGINAL CIVIL.**

The 6th September, 1893.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE STARLING.

Municipal Commissioner for the City of Bombay.....Appellant

versus

Syed Abdul Huk Kurmalker.....Respondent.*

Municipality—Municipal Act, III (Bom.) of 1888, Secs. 298, 299 and 301—

Land acquisition—Compulsory acquisition—Set back—Compensation paid

to owner for land with buildings thereon taken—Basis of valuation of

such land—15 per cent. addition to compensation not allowed—

Act XII of 1888, Sec. 3—Practice—Appeal from decision of

Judge of Small Cause Court granting compen-

sation for land taken by municipality.

Where, in case of set back, land with buildings thereon was taken up by the Municipal Commissioner from a private owner under Act III of 1888, Secs. 298, 299 and 301,

Held that the amount of compensation awarded to the owner should be calculated with regard to the price given within a few years previously for land of a similar character in the immediate neighbourhood of the land in question.

Held, also, that the addition of 15 per cent. could not be allowed.

The Municipal Commissioner v. Patel Haji Mohamed, I. L. R., 14 Bom., 292, followed.

[185] An appeal lies to the High Court from a decision of the Chief Judge of the Small Cause Court of Bombay granting compensation to the owner of land taken by the municipality in case of a set back under the Municipal Act III of 1888, Secs. 298, 299, 301.

APPEAL to the High Court against the decision of the Chief Judge of the Small Causes Court (see Act XII of 1888, section 3).

The respondent had claimed compensation from the appellant in respect of certain lands, together with the buildings thereon, situate at the junction of Apollo Street and Byrne Lane and in Byrne Lane in the city of Bombay, which were taken up by the appellant on behalf of the municipality, and the Chief Judge had awarded to the respondent a sum of Rs. 25,665-8-3 as compensation and interest thereon, at the rate of 5 per cent. per annum, from the 8th February 1882, until payment.

From this decision the Municipal Commissioner appealed to the High Court.

Inverarity and Scott, for the Appellant.

Lang (Acting Advocate-General) and *Macpherson*, for the Respondent.

Lang raised the point that no appeal lay. The only section giving an appeal to the High Court is section 3 of Act XII of 1884, but the appeal there given was only in cases under sections 503 and 504 of the Municipal Act (III of 1888). He referred to sections 293, 299, 301, 345 and 346 of the Municipal Act (III of 1888).

Per CURIAM:—We think an appeal lies.

The argument of the appeal then proceeded. The following authorities were referred to:—*In the matter of the Land Acquisition Act*, I. L. R., 15 Bom., 279; *The Municipal Commissioner for the City of Bombay v. Patel Haji Mahomed*, I. L. R., 14 Bom., 292; Statute 38 and 39 Vict., c. 36, sec. 19, cl. 2.

Cur. adv. vult.

Starling, J.:—The question for determination in this appeal is the amount to which the respondent is entitled in compensation in respect of a piece of land on the south side of Bruce Lane, [186] and running from Apollo Street to Church Lane, taken up by the Municipal Commissioner as a set-back. That amount is to be the value of the land as acquired, and that would be the market value of the land at the time when possession was taken by the Municipality. That value, in our opinion, is the price which a man, intending to use the land, or which the set-back was a portion, for the purposes for which it could be most profitably employed at that time, having regard to all its surrounding circumstances, would probably give for it.

The basis of valuation adopted by the surveyors, who were called on behalf of the respondent, seems to us to be faulty. In the first place, they calculate the value the land might have to the purchaser after he has built upon it and let out his building to tenants. They assume that the building will at once be fully let (allowing only for average casual vacancies), and they assume that a person buying to build will be content, at the time of purchase, to look forward to a net return of only 4 or 5 per cent. on the total cost of land and buildings, assuming his speculation to be entirely successful. It seems to me that a man buying a piece of land as a speculation for building purposes would require a larger percentage than that, certainly in this country, and would not pay a price for the land alone which would only enable him to get that comparative percentage after he had erected his buildings and run the risk of their letting up well or not. There are also other minor items, which seem to us to have been taken too favourably for the owner. Consequently we do not think that such a basis of valuation should be accepted in any case, certainly not when there is any more practical basis to work on.

In the present case there are materials of a much more practical character to hand, viz., the price given within the last few years for land of a similar character in the immediate neighbourhood, the price given by the respondent for the large plot of land of which the portion taken by the municipality forms a part, and, lastly, the price which he offered to take for the very piece.

In Exhibit No. 3 there are three plots marked which have changed hands comparatively recently. That coloured green [187] was purchased by Haji Allarakhia Nathu at the beginning of 1891 to build on at a price which showed the rate per square yard was about Rs. 46. It had no building on it at that time, so that the difficulty which arises in determining how much is to be allowed for buildings does not arise; but it is not so well situated as Sirdar's Palace is, for Apollo Street is there only half the width; it is opposite the respondent's property. Of the blue piece, plot A is, however, in our opinion, in quite as good a position as the respondent's property, though it has not so large a frontage to Apollo Street. The whole of the blue plot was sold in 1885 at a price which worked out a rate of about Rs. 100 a square yard, including buildings, the value of which is disputed; but, taking all things into consideration, we are of opinion that the value of the land itself cannot be taken at more than Rs. 50 a square yard for the whole plot; and assuming that the value of part A, as facing the wide part of Apollo Street, was worth double that amount, that would only give Rs. 100 a square yard for that portion, which we consider a very full rate for that piece.

The property coloured red was purchased in 1886 for a price which worked out to under Rs. 60 a square yard including buildings, and, deducting the value of the buildings, would probably leave the value of the land at about Rs. 30 a square yard.

This last plot is not in anything like as good a position as the front portion of the respondent's premises, though it is somewhat better than that of those abutting on Church Lane.

In 1886 the respondent purchased the whole plot of land known as the Old Secretariat, of which the strip now in dispute is a portion, at a price which, after deducting the value of existing buildings, would give about Rs. 30 a square yard, and on the 21st July 1888, he offered to sell the strip to the Municipality at the rate of Rs. 50 a square yard.

Within the last few years there does not seem to have been any material change in the value of land in the Fort. Consequently, all the foregoing materials can be used in this case without making any allowance for possible change of value.

[188] In calculating the compensation payable to the respondent, the strip of land has been divided into three portions; one coming up to Apollo Street containing, as finally settled by the Chief Judge of the Small Causes Court, 74.72 square yards, another at the Church Lane end containing 17.60 square yards, and the third between those two containing 183.93 square yards. Now, taking into account all the facts we have just drawn attention to, we think the respondent will be amply compensated if he is allowed Rs. 80 a square yard for the first portion, Rs. 50 a square yard for the second, and as a high value has been put upon the two end pieces because of the open space between them, which space must be kept open or with only low buildings thereon, in order to satisfy the value we have put on them, we think that the third piece cannot be valued at more than Rs. 20 a square yard. That will work out as follows:—

$$\begin{array}{r} 74.72 \text{ at } 80 = 5,977.60 \\ 17.60 \text{ at } 50 = 880.00 \\ 183.93 \text{ at } 20 = 3,678.60 \\ \hline 10,536.20 \end{array}$$

Of course these amounts are to a certain extent only approximate; but, in matter of this kind, it is absolutely impossible to ascertain a mathematically exact value of any piece of land, and the utmost that can be done is to take into

consideration all the surrounding circumstances and from them deduce, as a jury, the value which the owner ought to receive.

To the amount of Rs. 10,536-3-2 as calculated above must be added the sum of Rs. 181-12-3, the value of old erections allowed by the Chief Judge and not appealed against, which brings the total compensation up to Rs. 10,717-15-5.

The respondent by his objections has asked that he should be allowed 15 per cent. on the amount awarded him as on account of the compulsory nature of the acquisition. That point has already been decided against the respondent in the case of *The Municipal Commissioner for the City of Bombay v. Patel Haji Mahomed*, I. L. R., 14 Bom., 292, and we see no reason to differ from the decision in that case.

[189] The award of the Chief Judge of the Small Causes Court must, therefore, be varied by inserting the sum of Rs. 10,717-15-5 in the place of Rs. 25,665-8-3. The respondent will retain the costs awarded to him in the Court below, but must pay the costs of the appellant in this Court.

Attorneys for the Appellant:—Messrs. Crawford, Burder and Co.

Attorneys for the Respondent:—Messrs. Brown and Moir.

NOTES.

[See also (1908) 10 Bom. L. R., 907.]

[18 Bom. 189]

ORIGINAL CIVIL.

The 13th and 16th October, 1893.

PRESENT :

MR. JUSTICE STARLING, and on appeal, SIR CHARLES SARGENT, KT.

CHIEF JUSTICE, AND MR. JUSTICE BAYLEY.

Jijibhoy Muncherji Jijibhoy and others.....Plaintiffs

versus

Byramji Jijibhoy and others.....Defendants.*

Costs—Taxation—Attorney and client—Trustees—Bills of costs paid by majority of trustees—Right of dissenting trustee to have bills taxed even after payment.

In a suit relating to a charitable trust the decree directed that the costs of all parties hereto, when taxed, should be paid out of the trust fund. Certain bills of costs were subsequently, and cashed to the trustees by the attorneys. Two of the trustees thought the bills unreasonable, and agreed that they should be paid. The third trustee objected to the amount of the bills as exorbitant, and desired that they should be taxed. Notwithstanding his protest, however, the other trustees paid the bills without taxation. He, thereupon, took out a summons calling upon his co-trustees and the attorneys to show cause why the bills should not be taxed and why they should not refund any sum which had been overpaid.

Held, that the dissenting trustee was entitled to have the bills taxed, although they had been paid, and that the High Court had jurisdiction to order taxation to be made.

By the decree made in this suit on the 5th January 1889, it was ordered that a scheme should be prepared for the management of certain charities called the Jijibhoy Dadabhoy Trusts. The scheme was subsequently settled in chambers, and an order was made directing (*inter alia*) that the costs of all

parties to the suit when taxed as between attorney and client should be paid out of the Trust Fund.

[190] The trustees of the charities were the plaintiffs in the suit, and were three in number, viz., Jijibhoj Muncherji Merwanji, Rustomji Nanabhoy Byramji and Dadabhoy Bomanji Jijibhoj. In the month of September 1890, the trustees changed their solicitors, and the suit and matters connected with it were transferred to Messrs. Ardesir Hormasji and Dinsha, who, on the 12th April 1893, by request sent in their bills of costs for work done from September 1890 to the end of March 1893. There were two bills of costs sent in, one for Rs. 11,329-13-0 and the other for Rs. 842-2-0. These bills (less an abatement of Rs. 500) were paid by the two first mentioned trustees on the 21st June 1893.

On the 21st August 1893, the third trustee, Dadabhoy Bomanji Jijibhoj, took out a summons calling on his co-trustees and the solicitors (Messrs. Ardesir Hormasji and Dinsha) to show cause why the said bills of costs should not be taxed by the Taxing Master, and why such sums as might be taxed off should not be refunded to the charities by the solicitors.

The objecting trustee (Dadabhoy Bomanji Jijibhoj) in his affidavit stated that the bills sent in appeared to him to be exorbitant, and that he had called upon his co-trustees to get them taxed before settling them, but that notwithstanding his repeated protests the bills had been paid on the 21st June. On the 13th July 1893, he requested his co-trustees (through his solicitor) to get the bills taxed, and on the same day enquired of Messrs. Ardesir Hormasji and Dinsha if they were prepared to get them taxed; otherwise he would bring the matter before the Court. He set forth in his affidavit the items in the bills to which he objected.

The co-trustees also filed an affidavit, in which they stated that the bills of costs had been carefully examined and found to be reasonable; that the solicitors had rendered very valuable services to the charities, and that many charges which they might have made had been omitted by them from those bills. They said that these facts being brought to their knowledge they (i.e., the two co-trustees) had met and passed a resolution for payment of the bills. Their affidavit contained the following statements:—

[191] "5. We, Jijibhoj Muncherji Merwanji Jijibhoj and Rustomji Nanabhoy Byramji Jijibhoj, say that, having regard to the provisions of the trust-deed and the practice hitherto observed by the trustees, we were justified in passing the resolution aforesaid and paying the solicitors' costs without taxation.

"6. Several days after the aforesaid resolution we were informed that Mr. Dadabhoy objected to the bills being paid without taxation, but it is not true that he alleged the same to be exorbitant or improper. As it was competent to us to pay solicitors' costs without taxation, we made payment. A large portion of such costs had previously been paid pursuant to a resolution passed by the trustees, including the said Dadabhoy, on the 30th day of April 1892.

"7. We say that we, the present trustees and our predecessors in office for four years past, have paid solicitors' bills without taxation, and that Mr. Dadabhoy is a party to payment of costs of other solicitors connected with this suit without taxation."

The solicitors (Messrs. Ardesir Hormasji and Dinsha) also filed an affidavit denying that their charges were exorbitant and alleging that they were reasonable and proper charges according to the scale in the Taxing Master's office. They stated that between the 12th April 1893 (the day on which the bills were sent in) and the 21st June 1893 (on which day they were paid) the objecting trustee had not communicated with them directly or indirectly, and that they had no intimation that he required the bills to be taxed, or that he considered them "heavy" until they received his letter of the 13th July. They stated

that the trustees had full opportunity of examining the bills and getting them taxed if they so desired before payment, and they further alleged that they had caused enquiries to be made in the office of the Taxing Master and had ascertained that within the previous twenty-two years there was no precedent for a reference for taxation after payment, and they submitted that the Court had not the power to direct taxation after payment on a summary proceeding by summons.

The summons was argued on the 2nd September 1893.

Lang (Acting Advocate-General), for Dadabhoy Bomanji Jijibhoi in support of the summons.

Inverarity, for the two Co-trustees showed cause.

Macpherson, for Messrs. Ardesir Hormasji and Dinsha also showed cause.

[192] 26th March 1893. *Starling, J.*:—This matter arises out of a suit which was brought for the settlement of a proper scheme for the management of the Jijibhoi Dadabhoy Trust Charities, in which, by the decree directing a scheme to be prepared and by a subsequent order approving the scheme the costs of all parties to the suit when taxed as between attorney and client were ordered to be paid out of the Trust Funds.

After September 1890, Messrs. Ardesir, Hormasji and Dinsha acted as solicitors for the trustees of the Charity Funds, and a large amount of costs became due to them in respect of the preparation of the scheme and other matter connected with the carrying out of the decree of this Court. The solicitors had received, on account of their costs, a sum of Rs. 7,000. In April 1893 they sent in their bills of costs to the trustees, which, by the secretary to the Trust Funds, were circulated among the trustees for their orders. The balance then appearing to be due to the solicitors was Rs. 5,482-15-0. Two of the trustees minuted "should be paid off." The third trustee, Dadabhoy Bomanji, wrote a long minute in which he said the amount of the bills was exorbitant and that they should be taxed as ordered by the Court, and there after the proper balance should be paid to the solicitors. Subsequently, the two trustees got a reduction of Rs. 500 from the solicitors and paid the balance without taxation.

On the 21st August 1893, the dissenting trustee obtained a summons calling upon the other two trustees and the solicitors to show cause why the bills should not be taxed and why they should not repay any sum which had been overpaid. I think the two trustees were rightly made parties to the summons under the circumstances of the case, but I do not think I could in this summary proceeding make them repay any portion of the Trust Funds they may have improperly expended.

I treat the summons as one by a trustee who is dissatisfied with a payment of costs made by his co-trustees, asking that the bills of the solicitors to whom the payment was made may be taxed, and joining his co-trustees as defendants, because they will not take any part in the matter.

[193] Now it was argued that the Court has no jurisdiction to order costs to be taxed after payment, on the ground that such jurisdiction is in England given by statute, and that there is no statute applicable here. It is true that various Acts have been passed in England regulating the admission, duties and liabilities of attorneys there, and that by them the Courts in England have to be guided in their decisions; it seems also that the first Act so passed was in 1729. Consequently none of these Acts are in force in this country. What the practice was before 1729, I am unable to say, and I know of no treatise on the subject. It is also true that there is no information could be obtained. It is also true that there is

no such Acts in India, and the only rules we have are rules of the High Court regulating the admission of attorneys and their right to recover their costs in a summary manner, but that to my mind is no reason why the Court should not exercise a jurisdiction of this kind over its officers according to equity and good conscience guided by the general principles laid down by English cases. Consequently, I am of opinion that, upon a proper case being made out, the Court can in a proper manner call a solicitor to account in respect of the amount of his bill even after it has been paid.

It was then argued that, if the Court has such a power, it will not exercise it summarily, but only on a proper suit being filed. That may have been the case in former years, but in the latest case reported, where an alleged agreement between the attorney and client was in question—*In re Frappe*, L. R. (1893) 2 Ch., at p. 295,—LINDLEY, L. J., says: "Upon this appeal it was argued that if there is reason to suppose the agreement is unfair or unreasonable, yet you cannot impeach it on such a summons as this, but that some kind of formal proceeding—which, I suppose, according to the present practice, would be an action to set it aside—must be instituted. The language of the Act seems rather to favour that view. But when you consider it carefully, it appears to me there is really nothing in the argument; because so long as the solicitor has a proper opportunity of resisting taxation, it cannot matter whether the application to tax is by writ, or by a special petition to tax, or a summons to tax, as in this case. The [194] client may say: "I want an order to tax, notwithstanding the agreement." The agreement can be no answer to that, if he can show reasons why there ought to be a reference to the Taxing Master to inquire into that agreement." That was, in my opinion, a much stronger case for not going into the matter on a summons in chambers than the present one, and I shall follow the spirit of that ruling and hold that the present matter can be inquired into under the present summons.

Has, then, a case been made out for referring these bills to the Taxing Master? "The old rule that you must show either gross fraud or pressure or overcharge, does not obtain as an absolute rule. A decision in the Court of Appeal (*In re Boycott*, 29 Ch. D., 571), intimates that it is not an absolute rule;" per KAY, L. J., *In re Frappe*. Of course under ordinary circumstances I should not think of making an order to tax a bill, if it had been paid by a client who was *sui juris*, and dealing with his own money, after he had had an opportunity of examining it, and especially after he had discussed the matter with his solicitor and obtained from him a reduction in the amount. But that is not the case in the present instance. Messrs. Ardesir, Hormasji and Dinsha were solicitors for trustees, and they knew that the Court had ordered that certain costs taxed as between attorney and client were to be paid out of the Trust Funds, and they must have known that, if the trustees' accounts were called in question, no proof of the correctness of the payments to them would be accepted except the *allocatur* of the Taxing Master. Consequently, it was their duty to have so advised their clients, and it was their duty also to have had their bills taxed before they demanded payment of the balance. The fact that none of these things was done, seems to me to be a very sufficient reason why the amount of the bills should be inquired into.

It was further argued that as two out of three trustees agreed to pay the bills without taxation, their action binds the third, and that he, consequently, cannot now ask to have the bills taxed. I don't think so, especially as the funds were Trust Funds and could only be dealt with in carrying out the trusts or under an [195] order of this Court. It is quite clear that on the 12th June 1893, the present applicant, whatever might have happened before, expressed

his opinion that the costs ought to be taxed. In spite of this, the other two trustees on the 21st June, without obtaining the consent of their co-trustee or giving him any notice, paid the costs without taxation. On the 13th July, the applicant asked for an explanation from Messrs. Ardesir, Hormasji and Dinsha and again on the 7th August, but to neither of these letters did he get any reply, though as one of their clients, I think, he was by courtesy entitled to some explanation. Was he, then, to let the matter drop and run the risk at some future time of being called to an account for this payment at a time possibly when his means of proving it was proper payment even on taxation might be absent? In my opinion, he was not bound to do so, but was entitled to bring the matter before the Court and prevent himself being hereafter harrassed by a suit.

I, therefore, hold that these bills of costs must be taxed, and I refer them to the Taxing Master for that purpose, and I direct Messrs. Ardesir, Hormasji and Dinsha within fourteen days from this day to lodge the bills in question with the Taxing Master for the purpose of taxation. The remainder of the summons, including the question as to who is to pay the costs of taxation and the costs of and incidental to this summons up to this time, to stand over till the *allocatur* of the Taxing Master is produced.

The two consenting trustees and the solicitors appealed.

The appeal came on for hearing before SARGENT, C. J., and BAYLEY, J., on the 13th October 1893.

Macpherson for the two Trustees and *Scott* for the Solicitors (Messrs. Ardesir, Hormasji and Dinsha) in support of the appeal. They referred to Statute 2 Geo. II, c. 23, sec. 23; 1 Chitty's Practice (14th Ed.), p. 139; Stat. 6 and 7 Vict., c. 73, sec. 41; Danell's Chancery Practice (6th Ed.), p. 1993 *et seq.*; *Ibid.*, p. 2023; *Farhall v. Farhall*, 7 Ch. Ap., 123, at p. 126; the Supreme Court Charter, [196] clause x; the amended Letters Patent, 1865, clauses 19, 20, 21; High Court Rules No. 183 (p. 42); *Assur Purshotam v. Ruttonbai*, I. L. R., 16 Bom., 152; Supreme Court Rules No. 326; *In re Jackson, &c.*, 40 Ch. D., 495; *Lewin on Trusts* (9th Ed.), p. 275; *Massie v. Drake*, 4 Beav., 433; *In re Cheesman*, L. R. (1891), 2 Ch., 289.

They contended that the solicitors' account was settled and could not be opened—*Blagrove v. Routh*, 26 L. J. (Ch.), 86; *Stamar v. Evans*, 34 Ch. D., 470, at p. 476; *Ite Massey*, 34 Beav., 463; *Re Whalley*, 20 Beav., 576; *In re Walters*, 9 Beav., 299; *In re Thompson*, 30 Ch. D., 441, at p. 450.

Lang (Acting Advocate General), *contra*, referred (*inter alia*) to the Supreme Court Rule No. 151 (see Rules and Orders of High Court by Jamaitram Nanabhoy, p. 190) which is as follows:—

"The attorneys, solicitors and proctors shall not in any instance receive or demand the amount of any bill or part thereof, except reasonable advances to be accounted for before the Master, till the same shall have been taxed by the Master, who shall after taxation register the same in books to be kept by him for that purpose in his office, and shall be allowed to charge for the registering of such bill half a rupee per folio."

Sargent, C. J. :—We think that the order made by Mr. Justice STARLING must be affirmed. The decree in the suit directed that the costs should be paid out of the funds of the charity when taxed. It is clear, then, that in paying bills which have not been taxed, the trustees have not observed the direction contained in the decree. The payment appears to have been made notwithstanding the protest of one of the trustees, who, in requiring taxation, was acting strictly within his right and his duty. Even if other bills have been paid without taxation to his knowledge, we do not think that he thereby lost his

ght to have these bills taxed. A trustee of a charity cannot in such a case waive his right to require the taxation of bills of costs connected with the charity. The solicitors in acting for the trustees in this case must be regarded as acting for the charity, and we think the Court has jurisdiction in the matter.

[197] We have also been referred to the rule by which it is ordered that all bills of costs are to be taxed. The existence of this rule no doubt adds force to the argument for the respondent; but, quite independently of that rule, the Court in a case like the present would, in our opinion, have power to enforce taxation.

We are asked to add words to this order to the effect that it is made without prejudice to the rights of the solicitors to claim in respect of certain items of charge which they have omitted from these bills of costs. I do not think we ought to add anything to this order. No case of error or omission has been argued before us, and the affidavits which have been filed do not deal with the subject. Under these circumstances we shall leave the order as it stands.

Order affirmed.

Attorneys for the Appellants:—Messrs. Ardesir, Hormasji and Dinsha.

Attorneys for the Respondent:—Messrs. Chaik, Walker and Smetham.

[18 Bom. 197]

APPELLATE CIVIL.

The 27th February, 1893.

PRESENT :

MR. JUSTICE CANNY, AND MR. JUSTICE FULTON.

Krishnabai.....(Original Defendant) Appellant

versus

Khangowda.....(Original Plaintiff) Respondent.*

Hindu law—Partition—Minor—Partition effected without taking into account a minor co-parcener—Such partition invalid—Limitation.

A partition effected without reserving any share for a minor member of the family, and without the consent of some one authorized to act on his behalf, is invalid as against the minor.

Three brothers, S, L and K, were members of a joint Hindu family. In 1862, S and L divided the whole of the family property between them without reserving any share for their brother K, who was then a minor. K lived with L as a member of his family. L died in 1867, leaving a childless widow, with whom K continued to live till his death in 1876. K left an infant son (the plaintiff), only a year old. Subsequently S died in 1887, leaving two widows without issue. In 1889 the plaintiff, being still a minor, sued by his next friend to recover either [198] the whole or one-third of the family property in the possession of the widows of L and S. The principal defences to this suit were (1) that it was time-barred, and (2) that the plaintiff was not entitled to claim more than one-third of the property in suit.

Held, that the partition made by S and L in 1862 was invalid, as it was made without reserving any share for their minor brother K and without taking him into account. K

son was, therefore, entitled to recover the whole of the ancestral property as the sole surviving male member of the family.

Held, also, that the suit was not barred by limitation either under Act IX of 1871 or Act XV of 1877 in the absence of any evidence showing that K ever demanded partition and was refused, or that he was excluded to his knowledge from all participation in the family property.

APPEAL from the decision of Rao Bahadur Gopalrao Vinayek Bhanap, First Class Subordinate Judge of Belgaum, in Suit No. 416 of 1889.

The property in dispute belonged to one Khangowda, who died about thirty years ago. Khangowda left behind him three sons, namely, Shidgowda, Linggowda and Kalgowda.

In 1862 Shidgowda and Linggowda divided the whole ancestral property between themselves without giving any share to Kalgowda, who was then a minor.

Kalgowda lived with Linggowda as a member of his family. On Linggowda's death without issue in 1867, he continued to live with Linggowda's widow Krishnabai (defendant No. 3). She got him married, and he and his wife lived with her till his death in 1876.

At Kalgowda's death in 1876 his son (the plaintiff) was an infant, only one year old.

In 1887 Shidgowda died, leaving two childless widows (defendants Nos. 1 and 2).

In 1889 the plaintiff, who was still a minor, sued by his next friend to recover possession of the immoveable property in the defendants' possession, alleging that his father and uncles were members of a united family; that on the death of Shidgowda the whole of the ancestral property passed to him by right of survivorship, and that even if it were held that the family property was divided, he was at least entitled to one-third share of the property in dispute. *

Defendants Nos. 1 and 2 did not contest the suit.

[199] Defendant No. 3 (the widow of Linggowda) pleaded that the plaintiff's father had been dedicated to a *math*, that after his dedication his brothers Linggowda and Shidgowda had, in 1862-63, divided the whole family property into two equal shares, and that since then they had been in separate possession and enjoyment of their respective portions as absolute owners, and that the suit was, therefore, time-barred.

The Subordinate Judge held that the alleged dedication of plaintiff's father was not proved; that the suit was not time-barred; that the partition made by Linggowda and Shidgowda was not binding on plaintiff's father, as he was not party to it, and as, moreover, it was effected in fraud of his right; that there being no valid partition the family remained joint, and that the plaintiff as the sole surviving member of his family was entitled to the whole of the family property. He, therefore, passed a decree awarding possession of the whole property to the plaintiff.

Against this decree the defendant No. 3 appealed to the High Court.

Inverarity (with him *Mahadev B. Chaubal*) for Appellant (defendant No. 3):—We contend, in the first place, that the claim is barred by limitation. There was an actual division of the family property. It took place so far back as the year 1862. Ever since then both Linggowda and Shidgowda have dealt with the portions in their possession as their own absolute property. Their possession has been clearly adverse to the plaintiff and his father for more

than twelve years. Plaintiff's father attained majority in 1876. He was then entitled to sue for partition. The present suit was not filed till 1889. The suit is, therefore, barred by limitation. Even if the claim be not time-barred, the plaintiff is not entitled to more than one-third of the property in suit.

Jardine (with him *Ganpat Sadashiv Rao*) for the Respondent:—Where there are three brothers, two of them cannot divide the family property without consulting the third. In this case, Linggowda and Shidgowda divided the ancestral property without reserving any share for their minor brother. The division is, therefore, invalid and cannot bind the minor. That being the case, so far as the minor is concerned, he is entitled to regard the [200] family as still a united family. And as a matter of fact the minor Kalgowda lived with his brothers as a member of a joint family. He came of age in 1873, when the Limitation Act IX of 1871 was in force. Under that Act, and until there was a demand for partition and a refusal, limitation did not begin to run against a co-heir seeking partition. In this case there is no evidence to show that Kalgowda ever demanded partition and was refused. He died within three years after attaining majority, leaving behind him a minor son, the plaintiff in this case, who is still a minor. The suit is, therefore, not barred by limitation. Refers to *Kazi Ahmed v. Moro Keshav*, P. J. for 1878, p. 120; *Kane Bable v. Antaji Gangadhar*, P. J. for 1886, p. 315; I. L. R., 11 Bom., 455.

Candy, J.:—In this case, in my opinion, the question as to the right of the plaintiff to claim one-third share or the whole of the ancestral property does not arise. For the plaintiff's right to obtain possession of the family property which was in the possession of the widows of Shidgowda is admitted. The only question is as to the property which has been for many years in the exclusive possession of Krishnabai, the widow of Linggowda. If limitation had not begun to run against plaintiff's father Kalgowda as regards this property, when he died in December 1876, then there can be no bar; because, admitting Krishnabai's adverse possession since December 1876, up to the present time, the present plaintiff was one year old only when Kalgowda died, and the present suit has been filed by his mother and guardian, he being still a minor. It is evident, on the facts established by the evidence, that limitation was not running against Kalgowda when he died as regards the property which was managed by Linggowda after the partition in 1862, till his death in 1867, and after his death by his widow Krishnabai. Whatever may have been the motives of Shidgowda and Linggowda in entirely ignoring their infant brother Kalgowda in the partition of 1862, (possibly they then thought that he would be dedicated to the service of the *math*), it is clear that Kalgowda when he came back from the *math* lived with Linggowda as a member of his family. After Linggowda's death in 1867 he continued to live with Krishnabai; she got him married in her house, and he and his wife were united in food and [201] residence with her till the day of his death in December 1876. He allowed her to continue in management of the lands, but his existence as a member of the family and co-parcener in the property was recognized. On two mortgage bonds of 1871 his formal assent was taken. How far he was, and his son now is, bound by the acts of Krishnabai, who was allowed to exercise the rights of managership in respect of the property, need not now be considered. But it is evident, that Kalgowda could, at any time, have claimed possession of the property, and thus the present claim is, in no way, barred. Under this view of the facts, it is clear that the decree of the Subordinate Judge must be confirmed with costs.

Fulton, J.:—The only points urged by the learned counsel for the appellant were:—(1) Whether on the facts found proved by the Subordinate Judge

the plaintiff was entitled to recover more than one-third of the property in dispute? (2) Whether the suit was not time-barred? On both questions the answer must, in my opinion, be in favour of the respondent.

There were three brothers, Shidgowda, Linggowda and Kalgowda, of whom the first two divided the property between themselves, in 1862, without reserving any share for their minor brother Kalgowda, or apparently taking him into any account. Possibly, the reason for this action was their belief that he had been dedicated to a *math*; but it has been found that there was, in fact, no such dedication, and the finding is not disputed. In these circumstances, it seems clear that, so far as Kalgowda was concerned, the partition was not binding on him. Whatever may be the right of the father of a Hindu family to effect partition among his sons without their consent by the exercise of his own will, and whether or not a fair partition among the adult male co-parceners with the reservation of a minor's proper share may be binding on the minor, there seems no authority for the proposition that a partition, such as was here effected which did not consider the minor at all, could have any effect whatever on his position or leave him otherwise than a member of (what so far as he was concerned remained) an undivided family. Hindu law recognizes the equal rights of brothers in ancestral property, and [202] its authority cannot be relied on to uphold a partition manifestly inconsistent with its provisions. Apart from Hindu law, it was not suggested that two joint owners could, without the consent of the third, or of some person legally authorized to consent on his behalf, alter his position as joint owner of the whole property.

The only question, then remaining for consideration is whether the plaintiff's claim to recover the whole property is time-barred. Linggowda died about 1867; Kalgowda, the father of the plaintiff, in 1876; and Shidgowda in 1887. The exact date at which Kalgowda came of age is not quite certain, but probably he attained the age of majority under the Hindu law then in force about nine years before his death or in 1867 (*vide* Exhibit 50). This is the view put forward by the appellant's counsel, and for the sake of argument I accept it as the one most favourable to his case. It is clear, however, that Kalgowda's rights in the property were not extinguished either by Act XIV of 1859 or by Act IX of 1871. The former Act did not remain in force for twelve years after the partition of 1862, and it is not alleged that there was ever any demand for partition by Kalgowda such as would render applicable article 127* of Act IX of 1871. We have then to consider whether time had begun to run against him under article 127† of the present Act. The burden of proving the fact of Kalgowda's exclusion to his knowledge rests on the defendant, and it does not seem to me that there is anything in the evidence to establish such exclusion.

* [Art. 127 :—

Description of suit.	Period of limitation.	Time when period begins to run.
By a Hindu excluded from joint-family property to enforce a right to share therein.	Twelve years ...	When the plaintiff claims and is refused his share.]

† [Art. 127 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a person excluded from joint-family property to enforce a right to share therein.	Twelve years ...	When the exclusion becomes known to the plaintiff.]

It was urged that he must have known of the third defendant's enjoyment of a part of the family property, but I do not think it is shown that he was aware of an intention to exclude him from his rights when he chose to assert them. He was a party to her mortgage (Exhibit 50); but the fact that it was thought necessary to make him a party, indicates rather an acknowledgment than a denial of his rights. According to Krishnabai's evidence he lived principally with Shidgowda, but he died in the house of Krishnabai, with whom he was evidently on good terms, (cf. P. J. for 1886, p. 315; I. L. R., 11 Bom., 455). No attempt was ever made to allot him any separate share whatever, and it cannot be assumed that he ever assented to the partition made [203] during his minority; for it would require very strong evidence to show an assent to his own entire exclusion from his rights. Exhibit 50 shows that he was aware of the partition deed of 1862, but the omission to allot him any share indicates that the matter was allowed to rest, and that no attempt was made to define his interest in the property. Under these circumstances, I do not consider that limitation ever began to run against him, nor has it ever begun to run under article 127 against the present plaintiff, who is still a minor. Consequently, up to the death of Shidgowda in 1887, the plaintiff still retained his right to sue for partition, and the appellant's tenure of the property, in her possession, is not proved to have been adverse to him up to that period. On the death of Shidgowda, plaintiff's right to sue to enforce his right to share in the property probably ceased, and his right to sue for possession of the whole property commenced. To such a suit article 144 would apply, but as less than twelve years have elapsed since Shidgowda's death, and as, moreover, the plaintiff is a minor, his right to sue is clearly not barred under this article.

The decree must accordingly be confirmed with costs.

Decree confirmed.

NOTES.

[Where the parties are before the Court, it may award the mother her share after declaring that the partition made without giving her her share, was not binding on her:— (1904) 31 Cal., 262 P. C.]

As regards exclusion, see also (1896) 22 Bom., 259.]

[18 Bom. 203]

APPELLATE CIVIL.

The 25th February, 1893.

PRESENT :

SIR CHARLES SARGENT, KT., CHIEF JUSTICE, AND MR. JUSTICE TELANG.

Sakhalchand Rikhawdas and another.....(Original Plaintiffs) Appellants
versus

Velchand Gujar and others.....(Original Defendants) Respondents."

Decree—Execution—Limitation—Appeal—Appeal against part of decree—

*Decree affirmed in appeal—Decree to be executed is the appellate decree,
and limitation runs from date of that decree.*

In a suit for the value of goods and damages, the Court allowed the claim with respect only to a portion of the plaintiffs' claim, and rejected the rest. The plaintiffs appealed against the latter part of the decree. The decree was confirmed in appeal. The plaintiffs applied for execution of the decree after the expiration of three years from the date of the original decree.

but within three years from the date of the appellate decree. The lower Court rejected the application as time-[204] barred, being of opinion that the original decree still existed, there having been no appeal against that part of the decree which allowed the claim.

Held, discharging the order of rejection, that when the Appellate Court confirms the decree of the Court below, the latter becomes incorporated in the decree of the Appellate Court, which is thenceforth the only decree to be executed.

THIS was an appeal from an order passed by Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in execution of a decree.

The plaintiffs sued the defendants to recover certain ornaments and clothes or their value, namely, Rs. 1,332-8-0. They also claimed Rs. 5,001 for damages. On the 24th July 1889, the Subordinate Judge passed a decree for the plaintiffs with respect to some of the ornaments and clothes, or their value, Rs. 940-4-0. The rest of the plaintiffs' claim was dismissed. The defendants did not appeal against the decree, but the plaintiffs appealed to the High Court (the amount of the original claim being more than Rs. 5,000) against the decree so far as it dismissed part of their claim. The High Court confirmed the decree of the Subordinate Judge on the 10th September 1891.

On the 9th September 1892, the plaintiffs presented an application (*darkhast*) for the execution of the decree. The Subordinate Judge rejected the application and passed the following order:—"This *darkhast* is beyond time and should be rejected.....The High Court confirmed the decree of the Court below. It seems to me that the award of Rs. 940-4-0 was not the subject-matter of the appeal, and limitation begins to run from the date of the original decree, which is the only decree which awards that sum to the plaintiffs. That decree was passed on 24th July 1889, and the present *darkhast* was presented on 9th September 1892."

Against this order the plaintiffs preferred the present appeal.

Ganesh Krishna Deshmukh for the Appellants (plaintiffs):—The High Court confirmed the Subordinate Judge's decree as a whole, and the decree to be executed is the appellate decree. The period of limitation must, therefore, begin to run from the date of that decree. Our *darkhast* is, therefore, within time.

The Respondents did not appear.

[205] *Sargent, C. J.*:—The First Class Subordinate Judge is wrong in supposing that the original decree existed for the purpose of execution after the High Court confirmed it. The decisions in *Mahammad Sulaiman v. Muhammad Yar Khan*, I. L. R., 11 All., 267, and *Bhanushankar v. Raghunathram*, 2 Bom. H. C. Rep., (A. C. J.), 101, show that when the High Court confirms the decree of the Court below, the latter becomes incorporated in the decree of the High Court, which is thenceforth the only decree to be executed. We must, therefore, discharge the order of the Court below and send back the case for the First Class Subordinate Judge to dispose of the *darkhast* on the merits.

Order discharged and case sent back.

NOTES.

[This was followed in (1894) 19 Bom., 258; (1893) 18 Bom., 542; (1896) 22 Bom., 500; (1899) 23 Mad., 60; (1902) 26 Mad., 91; (1896) 23 Cal., 876; (1914) 16 Bom. L.R., 778.]

[18 Bom. 206]
CRIMINAL REVISION.

The 1st March, 1893.

PRESENT :

MR. JUSTICE CANDY AND MR. JUSTICE FULTON.

Queen-Empress
versus
Sadashiv Atmaram.*

Indian Penal Code (Act XLV of 1860), Secs. 499, 500—Defamation—Sending a notice containing defamatory matter to the complainant—Publication.

The mere sending a notice to a person, albeit containing matter of a defamatory nature, cannot be held to be equivalent to making or publishing an imputation "intending to harm or knowing or having reason to believe that it will harm the reputation of the person to whom it is addressed."

When the accused sent by post a notice to the complainant, containing certain false imputations, and the complainant thereupon prosecuted the accused on a charge of defamation under section 500 of the Indian Penal Code.

Held, that the accused was not guilty of defamation.

THIS was an application for revision under section 435 of the Code of Criminal Procedure (Act X of 1882.)

The accused was charged, under section 500 of the Indian Penal Code, with defaming the complainant by writing to him a notice containing certain false imputations to the following effect:— (1) You (the complainant) have been for the last several days behaving inimically towards me without any reason, and I have good grounds to think that you have caused false actions to be filed against me by others. (2) You have been, on [206] the strength of your official position, intimidating me from time to time without any reason. (3) On Monday the 31st October 1892, at about 7 A.M., you came to my shop and in the presence of others uttered all sorts of abuses and criminally intimidated me, and since then you have been sending me messages full of criminal intimidation. You have ventured to do so purely on the strength of your official position as a jamadar."

The accused was also charged, under section 506 of the Indian Penal Code, with committing criminal intimidation by threatening the complainant with injury to his reputation.

The accused was tried before Mr. Webb, the Third Presidency Magistrate, who convicted him on both charges and sentenced him to pay a fine of Rs. 100, or, in default, to suffer two months' rigorous imprisonment.

Thereupon the accused made the present application to the High Court under its revisional jurisdiction.

Vasudev Gopal Bhandarkar for the Accused.

There was no appearance for the Complainant.

Fulton, J.:—We see no reason to interfere with the conviction for criminal intimidation, but are of opinion that the charge of defamation has not been proved. The accused was charged with defaming the complainant by writing him a notice containing certain false imputations; but the mere sending of a notice to a person, albeit containing matter of a defamatory nature, cannot be

held to be equivalent to making or publishing an imputation intending to harm or knowing or having reason to believe that it will harm the reputation of the person to whom it is addressed. The Magistrate appears to have perceived the difficulty of convicting of defamation as stated in the charge, and in his finding said that the publication was proved by Sadashiv Narayan and Eshvant Supraji; but this was quite a different act of publication from that alleged, either in the complaint or the charge, and having regard to the provisions of section 198, Criminal Procedure Code, could not, we think, form the basis of a conviction of defamation. We reverse the conviction of defamation, and direct that out of the fine the sum of Rs 50 be so [207] funded to the accused, and that the remaining Rs. 50 be retained as the fine imposed for criminal intimidation. As the Magistrate convicted under two distinct sections, he should have imposed separate punishments under each.

As the complaint was made by the complainant as a private individual, and not in the capacity of a public servant, it ought to have been stamped.

Conviction for defamation reversed

